82-485

NO.

Office - Supreme Court, U.S.
FILED
SEP 14 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KATHY KEETON,

Petitioner,

vs.

HUSTLER MAGAZINE, INC., LARRY C. FLYNT, LFP, INC. and L.F.P., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented

1. Where the requirements of a state's longarm statute have been met, and the court would have personal jurisdiction of a suit by a resident plaintiff against the defendants, does the due process clause of the United States Constitution nevertheless prohibit that state from exercising personal jurisdiction over the defendants merely because the plaintiff is not a resident of the forum?

2. Where a plaintiff suffers damages in the forum by activity taking place there, is the right of the forum state to exercise jurisdiction over the wrongdoer for such activity prohibited by the due process clause of the United States Constitution merely because the plaintiff is not a resident of the forum?

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2 Restatement 2d, Conflict of Laws (1971) Sec. 36, Comment C 6

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KATHY KEETON,

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HUSTLER MAGAZINE, INC., LARRY C. FLYNT, LFP, INC. and L.F.P., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Kathy Keeton prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in the above-entitled action on June 16, 1982.

Opinion Below

The opinions of the Court of Appeals, 682 F.2d 33, and the District Court, not officially reported, appear in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on June 16, 1982, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statutory Provisions Involved

The First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States, New Hampshire's Criminal Defamation Statute, R.S.A. 644:11, and the relevant portion of New York's long arm statute, CPLR §302(a)(2)(3), are set out in their entirety in the Appendix hereto. New Hampshire's long-arm statute, R.S.A. 300:11-15 and R.S.A. 510:4 are appended in full to the opinion of the Court of Appeals.

Statement of the Case

In April 1977, Kathy Keeton, a resident of New York, brought an action in the Franklin County Court of Common Pleas of Ohio for libel and invasion of privacy against Hustler Magazine, Inc. She was joined as plaintiff in that action by Robert C. Guccione, the publisher of Penthouse Magazine. The complaint alleged tha Flynt and Hustler had waged an unrelenting campaign of malicious libel against the plaintiffs which culminated in a cartoon published in the May 1976 issue of Hustler Magazine that, *inter alia,* accused Guccione of infecting Keeton with a venereal disease.

In May 1978, Keeton's cause of action for libel was dismissed as barred by the Ohio statute of limitations. Keeton

did not appeal because she believed that substantially the same damages could be recovered in her suit for invasion of privacy. However, literally on the eve of trial, on February 19, 1980, the Ohio trial court dismissed Keeton's invasion of privacy claim on the theory that the New York statute of limitations was migratory and barred her claim. That order was entered on February 28, 1980, and Keeton filed a Notice of Appeal on March 20, 1980. On September 30, 1980, the Franklin County Court of Appeals affirmed the dismissal of Keeton's privacy claim, based upon the application of the New York statute of limitations.

Keeton promptly commenced this action in the United States District Court for the District of New Hampshire on October 21, 1980.* The jurisdiction of the New Hampshire district court was invoked under 28 U.S.C. §1332: the plaintiff is a resident of New York, the individual defendant a resident of California and the remaining defendants are Ohio corporations.

In an opinion issued on June 18, 1981 (2a-8a) the district court granted defendants' motion to dismiss on the ground of lack of personal jurisdiction. The district court found that while defendants' activity in New Hampshire may have been suffifficient to satisfy that state's long-arm statute—particularly since such contacts with New Hampshire "were not random, isolated or transitory" but were "purposefully directed at New Hampshire" (5a)—plaintiff's minimal contacts with the forum and the absence of a state interest in protecting nonresidents from defama-

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* This action asserts libel resulting from the scurrilous cartoon published in the May 1976 issue of Hustler Magazine, as well as publication of nude photographs of a 50-year-old female in the September 1975 issue of Hustler, falsely identified as Kathy Keeton, and several subsequent issues of the magazine reprinting or referring to those same photographs.

tion would render it unfair as a matter of due process to permit New Hampshire to assert jurisdiction over the defendants.

The Court of Appeals affirmed on June 16, 1982 (11a-20a), similarly holding that the due process clause of the federal constitution prohibited the exercise of personal jurisdiction, even though the New Hampshire long-arm statute was satisfied and even though a resident of New Hampshire could have maintained such a suit. Thus, the courts below have forced New Hampshire to discriminate against nonresidents in favor of residents; and to deny nonresidents access to its courts while granting residents access under identical circumstances. We do not believe that the due process clause can be constitutionally applied in such a manner. Cf. *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952).

REASONS FOR GRANTING THE WRIT

1. In focusing on plaintiff's contacts with the forum, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

It is a distortion of the "fairness" test for the court below to close the doors of the New Hampshirt courts once defendants' minimum contacts with that jurisdiction have been established. Such a holding impacts upon every case brought by a nonresident, and suggests a new, impermissable emphasis upon plaintiff's contacts with the forum—an approach inconsistent with the teaching of this Court.

The seminal case of *International Shoe Co.* v. *State of Washington,* 326 U.S. 310, 316 (1945), focused the due process analysis upon the *defendant's* contacts with the forum:

> ". . . due process requires *only* that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (Emphasis added) (Citations omitted).

In *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286, 292 (1980), this Court emphasized "[t]he relationship between the defendant and the forum" as the test of reasonableness and identified other relevant factors, none of which included plaintiff's contacts with the forum. This Court has never included plaintiff's relationship with the forum as an element of the due process analysis. Such an omission was not accidental, as recently confirmed by the decision in *Rush* v. *Savchuk,* 444 U.S. 320 (1980).

In *Rush,* this Court declared unconstitutional the line of cases typified by *Seider* v. *Roth,* 16 N.Y.2d 111 (1966), which permitted a resident to obtain *quasi in rem* jurisdiction over a nonresident by attaching the insurance company's obligation to defend arising from the defendant's insurance policy. Criticizing the *Seider* variety of cases, this Court observed that "they shift the focus of inquiry from the relationship among the defendant, the forum and the litigation to that among the plaintiff, the forum, the insurer, and the litigation." *Id.* at 332. This Court concluded that this shift was neither intended nor permitted by the holding in *International Shoe*:

> "This subtle shift in focus from the defendant to the plaintiff is most evident in the decisions lim-

> iting Seider jurisdiction to actions by forum residents on the ground that permitting nonresidents to avail themselves of the procedure would be unconstitutional. *In other words, the plaintiff's contacts with the forum are decisive in determining whether the defendant's due process rights are violated.*
>
> *Such an approach is forbidden by International Shoe and its progeny." Id.* (Emphasis added).

Abandoning all semblance of subtety, the court below simply seized upon plaintiff's lack of contacts with New Hampshire as the decisive factor in dismissing the lawsuit.

In addition, the Court of Appeals sought to justify its conclusion by observing that "New Hampshire has no special interest in protecting a nonresident against this out-of-state activity" (18a). But there can be no doubt that a tort was committed in New Hampshire by the distribution there of the defamatory publications. The Supreme Court of New Hampshire expressly recognized the important state interest in such circumstances:

> "A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort." *Leeper* v. *Leeper*, 114 N.H. 294, 298 (1974), quoting from Restatement 2d, Conflict of Laws §36, Comment e (1971).

The "especial interest" identified by the New Hampshire Supreme Court in *Leeper* is no less present in a

defamation case. As the court in *Leeper* stressed, it is "wrongful conduct" which the State of New Hampshire seeks to deter—the state's "especial interest" in deterrence is not affected by the damags caused by such wrongful conduct. The pivotal factor is *conduct*—whether the plaintiff has been damaged extensively or minimally in New Hampshirt should not erode New Hampshire's resolve to deter tortious conduct wherever it may be found within state borders.

Were defendants citizens of New Hampshire, they could certainly be sued there. If defendants' home state is thus viewed as having an interest in policing the conduct of its residents, then surely there is an even greater interest in monitoring the affairs of those nonresidents who intrude themselves into the commerce of the forum and exploit its citizens for profit and commercial gain.

Furthermore, New Hampshire has an abiding interest in deterring criminal conduct. Defendants' activities in New Hampshire violate that state's criminal defamation statute, which makes it a misdemeanor if a person "purposely communicates to any person, orally or in writing, any information which he knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule." R.S.A. 644:11(A).

The court below indicated that the only obstacle blocking jurisdiction was its decision in *Seymour* v. *Parke, Davis & Co.*, 294 F. Supp. 1257 (D.N.H. 1969), *aff'd*, 423 F.2d 594 (1st Cir. 1970). This case presents facts far different from those which the court held insufficient to support jurisdiction in *Seymour;* moreover, this case falls within each of the two independent exceptions identified in *Seymour* as circumstances in which jurisdiction could be constitutionally exercised.

Seymour was an action for personal injury and wrongful death caused by a drug manufactured by the defendant pharmaceutical company. The contaminated drug was prescribed by a Massachusetts physician, purchased in a Massachusetts drug store and ingested by plaintiff's decedent in Massachusetts, where he lived at all times until his death.

In *Seymour,* the tort occurred in Massachusetts, whereas here the tort occurred in New Hampshire because the libel was published there. In *Seymour,* the only complaint about defendant's drug was with respect to the single dosage taken by plaintiff's decedent in Massachusetts. Here, the actual product complained of was in fact circulated in New Hampshire—some 50-75,000 copies of Hustler Magazine "contaminated" with the offensive libel were distributed throughout the state.

The district court in *Seymour* acknowledged the the case was one of "first impression", 294 F. Supp. at 1260, so that the ruling would be "limited to the facts of the instant case," *id.* at 1263. Central to the district court's decision was its conclusion that New Hampshire "has *absolutely no interest whatsoever* in the litigation". *Id.* (Emphasis added). However, in view of the subsequent decision of the New Hampshire Supreme Court in *Leeper* and the New Hampshire criminal defamation statute, New Hampshire has clearly identified its "especial interest" in deterring tortious and criminal conduct within its borders.

The *Seymour* case actually supports the exercise of jurisdiction here because of the due process guidelines enumerated by the Court of Appeals:

> "If the plaintiff has some attachment to the forum, or if the defendant has adopted the state as one of its major places of business, we would

> have no question of the right of the state to subject the defendant to suit for *unconnected causes of action. Nor would we even if the forum were not a major center of defendants' business but were nevertheless a community into whose business life fendant had significantly entered as determined by the quality, substantiality, continuing and systematic nature of its activities."* 423 F.2d at 587 (Emphasis added).

First, in this case the cause of action is *connected* to the forum because the libel occurred in New Hampshire. That alone under *Seymour* should satisfy the due process requirement of fairness. In *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 447 (1952), where *all* parties were nonresidents, this Court found that defendant's business activities were sufficient to permit an Ohio court to assert jurisdiction, even "where the cause of action arose from activities entirely distinct from its activities in Ohio."

Second, New Hampshire is certainly "a community into whose business life the defendant had significantly entered as determined by the quality, substantiality, continuity and systematic nature of its activities." To meet this test, it is not required that New Hampshire be "a major center of defendant's business," but only a community into which the defendant has entered on a regular and substantial basis, as already found by the district court below (5a). Defendants' interrogatory answers reveal that during the five months between November 1977 and March 1978, defendants distributed 94,050 copies of Hustler Magazine in New Hampshire, earning gross revenues of $235,125 ($2.50 per copy). Using that period as a typical five-month circulation figure, defendants since 1975 have distributed over 1,692,900 Hustler Magabines in New Hampshire, earning

over $4,232,250 in gross revenues to date (on the basis of $2.50 per issue, although the cover price has since increased). This persistent exploitation of the New Hampshire marketplace surely qualifies as the kind of "significant" involvement contemplated by *Seymour*.

In a case jurisdictionally indistinguishable from this action, the New Hampshire district court exercised jurisdiction. *Galonis* v. *National Broadcasting Co.*, 498 F. Supp. 789 (D.N.H. 1980), was a defamation action brought in New Hampshire by a *Pennsylvania* citizen and *Pennsylvania* corporations against *Delaware* corporations with principal offices in *New York*. The court rejected defendants' argument that "venue in New Hampshire is improper because the damages (if any) incurred by the plaintiffs were national and not confined to New Hampshire . . ." *Id.* at 791. Thus, although the defendants in *Galonis* raised the issue of reputation damages caused by a nationwide defamation, the court entertained the lawsuit even though the primary situs of injury was arguably in Pennsylvania (plaintiff's state of residence) and the damages suffered in New Hampshire were no greater than that incurred in other jurisdictions. Significantly, the federal court exercised jurisdiction in *Galonis*, although New Hampshire has no more of an interest in that defamation case brought by a nonresident than it has in this litigation.*

The risk of being sued in a foreign jurisdiction is not unexpected for a publisher who expolits a nationwide market. See *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980); *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957). The Fifth Circuit in *Curtis Publishing Co.* v. *Golino*, 383 F.2d 586, 590 (5th Cir.

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* This Court too has upheld jurisdiction in a case brought by a nonresident against a nonresident. *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952).

1967), drew a sharp distinction between publications seeking a national audience and those geared primarily for local consumption. The Fifth Circuit warned that a careful publisher could eliminate all contacts, other than circulation, with most jurisdictions and thereby enjoy an immuinty from suit in those forums "in spite of the pecuniary benefits gained in that very jurisdiction where it asserts it cannot be held legally accountable." *Id.* at 591.

> "Clearly it would not comport with notions of fair play and substantial justice to allow a business enterprise, whose overriding business purpose is maximum exploitation of the national market to be free from suit as a matter of law in all states but that of publication simply because physical contacts with the other states had been reduced to a minimum." *Id.*

If the risk of litigation is too great, the publisher can sever its connection with the jurisdiction or simply alleviate the risk by procuring insurance or otherwise passing along the expected costs to its customers. *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286, 297 (1980).

Even the New Hampshire district court has cautioned against erecting an "unreasonable barrier to lawsuits against foreign corporations, based not on the practicalities of the situation, but on legal formulas and fictions that bear no relationship to the facts of life in the 1970's." *Gill* v. *Fairchild Hiller Corp.,* 312 F. Supp. 916, 918 (D.N.H. 1970). The New Hampshire district court recognized the price a publication must pay for the benefits of national circulation:

> "The risk of suit being brought against them in any one of the fifty states is one of the risks that defendants must bear because of the nature of their business." *Id.*

Nor does this subject defendants like Hustler to unpredictable and inconsistent results, for choice of law principles will uniformly select the appropriate substantive law to be applied, regardless of the situs of the litigation.

Accordingly, refusing to permit New Hampshire courts to exercise jurisdiction over the defendants in this case constitutes the very "subtle shift in focus" which is "forbidden by *International Shoe* and its progeny", *Rush* v. *Savchuk, supra* at 332, and ignores the special risks and responsibilities imposed on the media as the price of doing business in an era where state lines have been obliterated by modern technology.

2. The Court of Appeals decision involves a jurisdictional question of great public importance which should be settled by this Court.

The opinions by the courts below have far-reaching consequences for every litigant who seeks to bring an action in a jurisdiction other than his home state. The opinions below have particular adverse consequences for libel plaintiffs in terms of limiting the available juirsdictions in which they can sue, with the possible hardship of compeling travel to the jurisdiction of the wrongdoer as the only available forum.

In part due to the proliferation of libel actions and the obliteration of state boundaries by modern technology, this Court in recent years has devoted considerable attention to the standards and constitutional defenses available in libel actions and the limits imposed by due process upon states seeking to expand the jurisdictional reach of their long-arm statutes. However, this Court has yet to address the novel issues raised herein, which combine the unique aspects of a defamation claim with the nebulous concept

of "fair play and substantial justice" as applied to a nonresident plaintiff in contrast to a resident plaintiff. In short, does due process mandate a different jurisdictional standard where the plaintiff is a nonresident rather than a resident? Or put another way, does the due process clause require a state to deny nonresidents access to its courts although under the same circumstances the state may grant access to residents?

The decision of the Court of Appeals affirming the dismissal of this action is based solely on due process grounds —"that the federal constitution . . . would not permit New Hampshire to exercise jurisdiction over defendants in this instance" (13a).* The Court of Appeals believed it would be constitutionally "unfair" to permit this lawsuit because of the special problems involved in a libel case (18a). While "the plaintiff must recover the damages caused in *all* states in one single suit" (17a), here, the court reasoned, "[n]early all the damages the plaintiff seeks arise from injury to her reputation outside of New Hampshire" (18a).**

The court thus recognized that plaintiff "is suing in part for damages suffered in New Hampshire" (15a)***,

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* There is no question that the New Hampshire long-arm statutes seek to extend jurisdiction over nonresidents to the fullest extent permitted under the federal constitution (13a).

** The court ignored the fact that damages in a libel action are not limited to injury to reputation, but may also include "personal humiliation, and mental anguish and suffering." *Gertz* v. *Welch*, 418 U.S. 323, 350 (1974).

*** This Court has suggested that a nonresident like Keeton can sue for injury suffered in the forum where a defendant has launched "its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state." *World-Wide Volkswagen* v. *Woodson*, 444 U.S. 286, 297-98 (1980).

but that it would be unfair to hold defendants responsible in a New Hampshire action for damages suffered outside of that state—"the New Hampshire tail is too small to wage so large an out-of-state dog" (19a). Keeton may not split her cause of action among several jurisdictions, and the policy behind the single publication rule requires a single lawsuit for multistate defamation; accordingly, the Court of Appeals affirmed the dismissal of the action in its entirety rather than permitting the case to proceed at least on the basis of damages suffered in New Hampshire.

The bizarre nature of this ruling becomes most apparent in the court's analysis of "fairness" under *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and its progeny. It is undisputed that an average of 10-15,000 copies of Hustler Magazine are distributed each month within New Hampshire. This commercial actively has been taking place on a regular basis since the inception of the publication in 1975.* As the district court found, these contacts "were not random, isolated or transitory" but "purposefully directed at New Hampshire . . ." (5a).** The defendants have therefore engaged in those acts by which they "purposefully avail [themselves] of the privilege of conducting activities with the forum state,

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* Keeton complains about five separate issues of Hustler Magazine: September 1975, October 1975, The Best of Hustler No. 2 (published in late 1975), May 1976 and July 1976, so that between 50-75,000 copies distributed in New Hampshire are the subject of this lawsuit.

** This case is therefore distinguishable from the "fortuitous circumstance" and "isolated occurrence" of a single automobile sold in one state that happens to suffer an accident while passing through the forum state. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 295, 297 (1980).

thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958).

Defendants' conduct in New Hampshire is no less purposeful because plaintiff was simultaneously harmed in other jurisdictions as well, nor does the extent of the harm caused Keeton in New Hampshire render the defendants' conduct any less tortious or any less purposeful. Certainly due process cannot prevent New Hampshire from redressing such conduct at the behest of a nonresident and at the same time permit New Hampshire to redress such conduct at the behest of a resident.

Once these minimum contacts are factually established, the jurisdictional inquiry should have come to an end, and due process does not permit further inquiry into plaintiff's relationship with the forum. That is the teaching set forth by this Court and other Courts of Appeal. *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 443 (1952); *Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980). Yet the court below seized upon the dubious proposition that the reputation damages suffered by a nonresident (but presumably not a resident) can be apportioned from state to state, and concluded that it would be "unfair" to permit suit in a forum of minimal damage.

The effect of this unusual holding is to either force a libel plaintiff to seek out the wrongdoer in his own jurisdiction or to confine the plaintiff to the forum of primary injury which, according to the courts below, is plaintiff's home state.* But this result totally ignores the purposeful acts of the defendants in causing plaintiff injury in New Hampshire. A consistent application of

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* Because Keeton is a New York resident, and New York's long-arm statute excepts a cause of action for defamation, Keeton would have no such choice. CPLR §302(a)(2)(3) (22a).

the rule created by the courts below would even render it "unfair" for plaintiff to sue in her home state and seek to recover damages for the harm suffered in other jurisdictions.

In support of its conclusion that it would be "unfair" to allow this action, the Court of Appeals cited the policies of penalizing "a plaintiff who sleeps on her rights" and the need to avoid subjecting a publisher to "the risk of suit covering all damage suffered everywhere as long as there is any state anywhere with a statute of limitations that has not expired." (18a). These considerations have no application to Keeton, who vigorously pursued her rights both in Ohio and New Hampshire. Moreover, the policy which seeks to protect a publisher against the interminable risk of lawsuits simply does not apply where the publisher has been put on notice of plaintiff's grievance and is aware that plaintiff is actively pursuing her rights.

CONCLUSION

This case presents an egregious example of a federal court's impermissible application of the due process clause to infringe upon a state's exercise of jurisdiction. Although the State of New Hampshire has enacted a long-arm statute which embraces jurisdiction over the defendants in this action, and even the federal courts would have permitted New Hampshire to exercise jurisdiction if the plaintiff was a resident, the court below incongruously held that allowing jurisdiction here would somehow be "unfair" to the defendants merely because of the fortuitous circumstance of plaintiff's nonresidence.

The application of the principles outlined by this Court in *International Shoe* and its progency yields predictable

jurisdictional results once the "minimum contacts" test has been met. However, according to the court below, where the plaintiff is a nonresident, satisfying the "minimum contacts" test does not end the jurisdictional inquiry, but begins a new inquiry that involves an impractical weighing of whether defendants' contacts are sufficient to overcome the factor of plaintiff's nonresidence. This novel and unworkable doctrine, invoked only where plaintiff is a nonresident of the forum, destroys the threshold level of "minimum contacts" which at least guaranteed consistent results under *International Shoe*, and substitutes in its place an undefined and unpredictable balancing test.

The confusing consequences of this decision require that a writ of certiorari issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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[Appendices Follow]

APÉNDICES

Order and Opinion of the United States District Court for the District of New Hampshire, Filed June 18, 1981

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

Civil Action No. 80-498-D

KATHY KEETON,

v.

HUSTLER MAGAZINE, INC., *et al.*,

JUDGMENT

In accordance with the Order dated June 18, 1981 by the Honorable Andrew A. Caffrey, United States District Judge, Sitting By Designation, judgment is hereby entered.

By the Court,

JANICE G. BURHOLD
Deputy Clerk

June 19, 1981

cc: W. Michael Dunn,Esq.
Dort S. Bigg, Esq.
Norman Roy Grutman, Esq.
Jeffrey H. Daichman, Esq.
C. William Brownfield, Esq.

Order and Opinion of the United States District Court for the District of New Hampshire, Filed June 18, 1981

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

Civil Action No. C-80-498-D

KATHY KEETON,

Plaintiff,

v.

HUSTLER MAGAZINE, INC., *et al.*,

Defendants.

OPINION

June 18, 1981

CAFFREY, J.*

This civil action for libel seeks damages on the basis of photographs and text which appeared in the September, 1975 issue of *Hustler* magazine, and a cartoon which appeared in the May, 1976 issue. Plaintiff Kathy Keeton, a resident of New York, filed her complaint on October 21, 1980 against defendants Hustler Magazine, Inc., an

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* Of the District of Massachusetts sitting by designation.

Order and Opinion of the United States District Court for the District of New Hampshire, Filed June 18, 1981

Ohio corporation, Larry C. Flynt, the publisher, editor and owner of *Hustler* and a resident of California, and LFP or L.F.P., Inc., an Ohio corporation which is the holding company for the magazine. An amended complaint was filed on November 3, 1980. Diversity of citizenship and the requisite jurisdictional amount are alleged. In May, 1977 Kathy Keeton, as a co-plaintiff, sued the same defendants in an Ohio state court for libel and invasion of privacy on the basis of the same publications. Her libel claims were dismissed in November, 1977 on the grounds that they were barred by the Ohio statute of limitations.

According to uncontradicted affidavits submitted by defendants, none of them owns any real estate or personal property in New Hampshire. The defendants further state that they have no offices or space, vehicles, bank accounts, telephones, telephone listings or listed address in the state. They hold no corporate or personal meetings and conduct no business in the state, other than the sale of a limited number of *Hustler* magazines, which are distributed through independent contractors. The defendants hold no ownership interest in the wholesalers or retailers who distribute the magazine. Receipts from the sale of the September, 1975, and May, 1976 issues containing the alleged defamatory subject matter constituted less than 1% of the total United States sales of *Hustler* for those time periods. Defendants do not advertise or solicit business in the state, except for the promotion contained in the magazines themselves.

The file of the instant case contains documents reciting that the plaintiff, Kathy Keeton, is associate publisher and senior vice-president of *Penthouse* magazine.

Order and Opinion of the United States District Court for the District of New Hampshire, Filed June 18, 1981

Penthouse is a rival of *Hustler* in the "adult entertainment" magazine business. Ms. Keeton and the publisher of *Penthouse*, Bob Guccione, are common-law husband and wife; and, together, they were co-plaintiffs in the 1977 libel suit against *Hustler* in Ohio state court. Ms. Keeton owns no real estate or personal property in New Hampshire, has never resided in the state, and presently lists a New York address as her place of residence. Her name appears three times in small print on the credits page of *Penthouse*. This listing of the various corporate officers and administrative executives is published in each monthly issue of the magazine. Apparently, this monthly listing is the plaintiff's sole contact with the forum state. The plaintiff alleges that she has acquired, through the publication of her name as a corporate officer and publisher of *Penthouse*, a reputation in the state of New Hampshire and has had that reputation damaged by the *Hustler* publications.

Plaintiff has the burden of pleading and proving facts which establish the Court's personal jurisdiction over the defendant. *Aro Manufacturing* v. *Automobile Research Corp.*, 352 F.2d 400 (1st Cir. 1965), *cert. denied*, 383 U.S. 947 (1966). Personal jurisdiction is alleged under the New Hampshire long arm statute, which authorizes service of process on any foreign corporation transacting business in the state. N.H. R.S.A. 300:41(c). The New Hampshire Supreme Court has held that the purpose of the statute is to extend jurisdiction over a non-resident to the fullest extent permitted under the Constitution. *Roy* v. *North American Newspaper Alliance*, 106 N.H. 92, 205 A.2d 844 (1964). Due process requires that in order to subject a foreign corporation to *in personam* jurisdiction, the defendant must have "minimum contacts" with

the forum state so that the institution of suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945); *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957). Consequently, the Court must determine whether the defendant's contacts were continuous and purposeful, such that it was forseeable that they would have consequences to plaintiff in the state. Cf. *Escude Cruz* v. *Ortho Pharmaceutical Corp.*, 619 F.2d 902 (1st Cir. 1980). Relevant factors are: the nature, purpose and number of contacts, the connection between the contacts and the cause of action, the interest of the forum, and convenience and fairness to the parties. *Whittaker Corp.* v. *United Aircraft Corp., et al.*, 482 F.2d 1079 (1st Cir. 1973).

Although defendants' contacts with New Hampshire are sparse, they were not random, isolated or transitory. The general course of conduct in circulating magazines throughout the state was purposefully directed at New Hampshire, and inevitably affected persons in the state. Although the person alleging injury in this case is not a state resident, the defendants' contacts may constitute sufficient presence in the state to satisfy the literal requirements of the long-arm statute. This is especially true since the due process limits governing state jurisdiction over out-of-state defendants have been substantially relaxed in recent years.

Protecting defendant, however, is not the only due process concern. The Supreme Court of the United States recently noted that the foreseeability that a defendant's activities would have an effect within the forum state is not a "sufficient benchmark" for personal jurisdiction

under the Due Process Clause. "[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes . . . The reasonableness of asserting jurisdiction over the defendant must be assessed in the context of our federal system of government." *World Wide Volkswagen, Corp.* v. *Woodson,* 444 U.S. 286, 293 (1979).

Even if the defendants have sufficient contacts to satisfy the literal requirements of the long arm statute, "the exercise of jurisdiction has to be reasonable from the standpoint of New Hampshire's interest in the litigation." *Leeper* v. *Leeper,* 114 N.H. 294, 296, 319 A.2d 626, 628 (1974). The concern for orderly and efficient administration of the laws is implicit in the requirement of fairness enunciated in *International Shoe.* Due process "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe, supra* at 319; cited in *World Wide Volkswagen, supra* at 294. Therefore, the determination of jurisdiction must take into account the forum state's interest in adjudicating the dispute, even if it results in denial of jurisdiction. In *Seymour* v. *Parke, Davis & Co.,* 423 F.2d 584 (1st Cir., 1970), the Court of Appeals for the First Circuit, noting that *International Shoe* "restricts, as well as enlarges, concepts of jurisdiction," held that fairness will not permit a state to assume jurisdiction where the plaintiff has no attachment to the forum, and the defendant has minimal business activities.

The state of New Hampshire's interest in any defamation action is to protect its citizens from the publication of libelous statements. Plaintiff is not one of its citizens,

in fact she has the barest of contacts with New Hampshire. Ms. Keeton has never resided here and presently resides in the state of New York. She has no property interests in the state and has not shown any factors which make her anything other than a stranger to the state of New Hampshire. The argument that she has acquired a reputation in the state because of the monthly publication of her name in the masthead of *Penthouse* magazine is strained at best. The magazine does not publish her picture and in no way attempts to distinguish her name from that of dozens of other names which appear on the magazine's credits page. Being listed in this litany of unknowns does not make her name a household word here, nor does it create a reputation or image of any kind in New Hampshire. In short, the plaintiff has demonstrated absolutely no connection with the state of New Hampshire. At best the state has only a tenuous, generalized interest in the present litigation. Any such interest is shared by the other forty-nine states and the foreign countries where *Hustler* is circulated. See *Curtis Publishing Co.* v. *Birdsong*, 360 F.2d 344 (5th Cir. 1966), cited in *Seymour, supra* at 587.

The plaintiff has had more than ample opportunity to bring a complaint in a forum having a rational nexus with the parties and events which give rise to this action. While the state of New Hampshire may have the only statute of limitations which has not run and thereby benefits the plaintiff, Ms. Keeton has failed to demonstrate sufficient foundation to justify the exercise of *in personam* jurisdiction by this Court. The attenuated relationship between the state of New Hampshire and the parties and events in the present case requires that the

Order and Opinion of the United States District Court for the District of New Hampshire, Filed June 18, 1981

complaint be dismissed for lack of *in personam* jurisdiction.

This ruling obviates any need for the Court to consider the additional issues raised by the defendants' motions, since personal jurisdiction must be considered as a threshold question. *LeRoy* v. *Great Western Corp.*, 443 U.S. 173 (1979).

Accordingly, the defendant's motion to dismiss for lack of personal jurisdiction is allowed.

ANRREW A. CAFFREY, J.
Andrew A. Caffrey, J.

cc: W. Michael Dunn,Esq.
Dort S. Bigg, Esq.
Norman Roy Grutman, Esq.
Jeffrey H. Daichman, Esq.
C. William Brownfield, Esq.

Order and Opinion of the United States District Court for the District of New Hampshire, Filed June 18, 1981

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

Civil Action No. C-80-498-D

KATHY KEETON,

Plaintiff,

v.

HUSTLER MAGAZINE, INC., *et al.*,

Defendants.

ORDER

June 18, 1981

CAFFREY, J.*

In accordance with opinion filed this date, it is

ORDERED:

Defendants' motion to dismiss is allowed.

Complaint dismissed.

ANDREW A. CAFFREY, J.
Andrew A. Caffrey, J.

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*Of the District of Massachusetts sitting by designation.

Order and Opinion of the United States District Court for the District of New Hampshire, Filed June 18, 1981

cc: W. Michael Dunn,Esq.
Dort S. Bigg, Esq.
Norman Roy Grutman, Esq.
Jeffrey H. Daichman, Esq.
C. William Brownfield, Esq.

Opinion of the United States Court of Appeals for the First Circuit, Entered June 16, 1982

KATHY KEETON,

Plaintiff-Appellant,

v.

HUSTLER MAGAZINE, INC., *et al.*,

Defendants-Appellees.

No. 81-1489

United States Court of Appeals,

First Circuit.

Argued Jan. 6, 1982.

Decided June 16, 1982.

New York resident brought action against foreign enterprises involved in publication of magazine alleging that she was libeled by photographs and comments that appeared in defendants' magazine. The United States District Court for the District of New Hampshire, Andrew A. Caffrey, Chief Judge, dimissed the action, and plaintiff appealed. The Court of Appeals, Breyer, Circuit Judge, held that due process considerations precluded New Hampshire from exercising jurisdiction over defenadnts.

Affirmed.

Opinion of the United States Court of Appeals for the First Circuit, Entered June 16, 1982

CONSTITUTIONAL LAW 305(6)

Due process considerations precluded New Hampshire from exercising jurisdiction over foreign enterprises involved in publication of magazine in New York resident's libel action in light of the parties' minimal contacts with New Hampshire and in light of fact that nearly all damages plaintiff sought arose from injury to her reputation outside of New Hampshire. U.S.C.A. Const. Amend. 14; N.H. RSA 300.-14, 510:4, subd. 1.

Jeffrey H. Daichman, with whom W. Michael Dunn, Sheehan, Phinney, Bass & Green, Professional Association, Manchester, N.H., Norman Roy Grutman, and Grutman, Schafrann & Miller, New York City, were on brief, for appellant.

C. William Brownfield, Columbus, Ohio, with whom Dort S. Bigg, Gregory A. Holmes, Wiggin & Nourie, Manchester, N.H. and Brownfield, Bowen, Bally & Sturtz, Columbus, Ohio, were on brief, for appellees.

Before COFFIN, Chief Judge, BOWNES and BREYER, Circuit Judges.

BREYER, Circuit Judge.

The plaintiff-appellant in this case is a resident of New York who claims that she was libeled by photographs and comments that appeared in "Hustler Magazine" and "The Best of Hustler." She sues several Ohio corporations and one California resident involved in the enterprises that published the "libelous" materials. Originally she brought suit in Ohio, where the magazines were published. There, her libel claim was dismissed as barred by the Ohio statute of limitations and her invasion of privacy claim was dis-

missed as barred by the New York statute of limitations, which the Ohio court considered to be "migratory." Plaintiff then brought this suit in New Hampshire, which she says, is the only state remaining in which the statute of limitations has not run. The relevant New Hampshire "long arm" statutes (see appendix) authorizing service of process on defendants seek to extend jurisdiction over nonresidents to the fullest extent permitted under the federal constitution. *Leeper* v. *Leeper*, 114 N.H. 294, 296, 319 A.2d 626 (1974); *Roy* v. *North American Newspaper Alliance, Inc.*, 106 N.H. 92, 95, 205 A.2d 844 (1964). The federal district court dismissed this suit on the ground that the federal constitution—in particular the Due Process Clause of the Fourteenth Amendment—would not permit New Hampshire to exercise jurisdiction over defendants in this instance. We affirm its decision.

The district court reasonably concluded that defendants' contact with New Hampshire consist of sending magazines there to be circulated through independent distributors. Their circulation in New Hampshire amounts to less than one percent of their total circulation in the United States. Plaintiff's contacts with New Hampshire consist of the facts that her name is listed as a corporate officer or staff member of a magazine ("Penthouse") and that she is an editor of others ("Viva" and Omni") which have also circulated in New Hampshire. The basic legal standard imposed by the Due Process Clause is whether it is "reasonable" or basically "fair" to subject the defendant to suit in this forum under these circumstances. *International Shoe Co.* v. *Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945); *Seymour* v. *Parke, Davis & Co.*, 423 F.2d 584 (1st Cir. 1970). And, the Supreme Court has recently pro-

vided guidance for interpreting the "reasonableness" standard. In *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286, 292, 100 S.Ct. 559, 564, 62 L.Ed.2d 490 (1980), it wrote

> Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, *see McGee* v. *International Life Ins. Co.,* 355 U.S. 220, 223 [78 S.Ct. 199, 201, 2 L.Ed.2d 223] (1957); the plaintiff's interest in obtaining convenient and effective relief, *see Kulko* v. *California Superior Court,* [436 U.S. 84, 92 [98 S.Ct. 1690, 1696, 56 L.Ed.2d 132] (1978)], at least when that interest is not adequately protected by the plaintiff's power to choose the forum, *cf. Shaffer* v. *Heitner,* 433 U.S. 186, 211, n.37 [97 S.Ct. 2569, 2583, 53 L.Ed.2d 683] (1977); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in further fundamental substantive social policies, *see Kulko* v. *California Superior Court, supra* 436 U.S. at 93, 98 [98 S.Ct. at 1697, 1700.]

Thus, the Supreme Court would have us judge "reasonableness" and "fairness" not exclusively from the point of view of defendant's contacts with the state. To the contrary, "[i]f a defendant has certain judicially cognizable ties with a State, a variety of factors *relating to the particular cause of action* may be relevant to the determination whether the exercise of jurisdiction would

comport with 'traditional notions of fair play and substantial justice.'" *Rush* v. *Savchuk*, 444 U.S. 320, 332, 100 S.Ct. 571, 579, 62 L.Ed.2d 516 (1980) (emphasis supplied). We have previously noted the relevance of all these factors, *Seymour* v. *Parke, Davis & Co.*, *supra*, as has the State of New Hampshire in interpreting its jurisdictional statute. *Leeper* v. *Leeper*, 114 N.H. at 296, 319 A.2d 626.

Applying these standards to this case, we first note that defendants' contacts with the state are minimal; they have no offices, employees, bank accounts, real property or other business connections there. Plaintiff's contacts are even fewer, consisting of her name on the masthead of, at most, three magazines. And, New Hampshire's interest consist of a desire to deter wrongful conduct within its boundaries, *Leeper* v. *Leeper*, 114 N.H. at 298, 319 A.2d 626, a desire to protect its citizens from reading libels about outsiders. *Curtis Publishing Co.* v. *Birdsong*, 360 F.2d 344, 347 (5th Cir. 1966), or a desire to prevent injuries to the reputations of outsiders from occurring within the state because those outsiders may someday be hurt if they turn up in New Hampshire or because there may be a spillover effect on their reputations elsewhere. There is no allegation suggesting that the allegedly defamatory publication was "aimed exclusively" or primarily at New Hampshire, *see Edwards* v. *Associated Press*, 512 F.2d 258, 267-68 (5th Cir. 1975), or that it caused a "substantial effect" on that state, *see Anselmi* v. *Denver Post, Inc.*, 552 F.2d 316, 325 (10th Cir.), *cert. denied sub nom. Times Mirror Co.* v. *Anselmi*, 432 U.S. 911, 97 S.Ct. 2960, 53 L.Ed.2d 1084 (1977); *Church of Scientology of California* v. *Adams*, 584 F.2d 893, 898 (9th Cir. 1978).

The major factor favoring plaintiff is that she is suing in part for damages suffered in New Hampshrie. Case

law makes clear that defendants' few contacts with New Hampshire—sending in magazines—would be sufficient to support a suit by a New Hampshire resident for libel occurring in New Hampshire. *Buckley* v. *New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967); *see Curtis Publishing Co.* v. *Golino*, 383 F.2d 586, 591-92 (5th Cir. 1967). *See also* R. Sack, *Libel, Slander and Related Problems* 509-10 (1980). In such case, defendant's minimal presence would combine with plaintiff's many contacts, New Hampshire's interest in protecting its residents, and the fact that defendant's presence itself caused the injury—in making it fair to allow the suit. The Supreme Court has also suggested that if the defendant has launched "its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State," an out-of-state plaintiff might be able to sue in the forum state for in-state injury. *See World-Wide Volkswagen* v. *Woodson*, 444 U.S. at 297-98, 100 S.Ct. at 567-68.

The major factor favoring defendants is that *most* damages that plaintiff seeks arose *outside* the state of New Hampshire. We held specifically in *Seymour* v. *Parke Davis & Co., supra,* that an out-of-state plaintiff could *not* bring against an out-of-state defendant (with a few state contacts) a suit based upon out-of-state activity. Although at least one Supreme Court case has allowed an "out-of-state plaintiff/out-of-state defendant/out-of-state activity" suit, *Perkins* v. *Benguet Consol. Mining Corp.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952), in that case the Court noted defendant's intense "continuous and systematic business contacts" with the forum state (offices, corporate officers, secretaries) and that the only alternate forum was highly inconvenient

(the Philippines)—factors missing both in *Seymour* and here.

In other words, *Buckley* combined with *Volkswagen* would seem to allow this suit insofar as it alleges New Hampshire-based defamation, but *Seymour* would seem to forbid it insofar as it is based upon outside-New Hampshire activity. The difficulty with the case lies in the fact that, unlike *Seymour*, some of the activity about which the plaintiff complains took place in New Hampshire, but unlike *Buckley*, plaintiff lives outside of New Hampshire and most of the activity about which plaintiff complains took place outside the state.

This difficulty arises out of the special cause of action asserted in this case: a libel allegedly caused by a publication that circulated in more than one state. The distinctive element of a "multistate defamation" action is that the plaintiff must recover the damages caused in *all* states in one single suit. *Patch* v. *Playboy Enterprises, Inc.*, 652 F.2d 754, 757 (8th Cir. 1981); *Proctor* v. *Gissendaner*, 579 F.2d 876, 880 n.7 (5th Cir. 1978), *modified*, 587 F.2d 182 (5th Cir. 1979); *Eliah* v. *Ucatan Corp.*, 433 F.Supp. 309 (W.D.N.Y. 1977); *Restatement (Second) of Torts* § 577A(4) (1977). Of course, in that suit, ordinarily "rights and liabilities . . . are determined by the local law of the state which . . . has the most significant relationship to the occurrence and the parties . . .," *Restatement (Second) of Conflict of Laws* § 150 (1971)—a fact that minimizes the incentive to shop for a forum. But, this sensible conflicts rule does not necessarily apply to the forum's own statute of limitations—a statute which, if considered "procedural," will be applied by the forum state. *See Restatement (Second) Conflict of Laws* §§ 104-

05 (1971). Indeed, in this case, it seems likely that New Hampshire (unlike Ohio) would consider its statute of limitations procedural, and apply it, resurrecting an action that is dead everywhere else. *See Barrett* v. *Boston & Maine Railroad*, 104 N.H. 70, 178 A.2d 291 (1962); *Gordon* v. *Gordon*, 118 N.H. 356, 360, 387 A.2d 339 (1978); *Cf. Dupuis* v. *Woodward*, 97 N.H. 351, 88 A.2d 177 (1952). This fact explains why plaintiff wishes to sue in New Hampshire, but it does not automatically make it fair for her to do so.

Indeed, these very circumstances suggest why it would be unfair to allow plaintiff to sue. Nearly all the damages the plaintiff seeks arise from injury to her reputation outside of New Hampshire caused by activity that took place outside of New Hampshire. New Hampshire has no special interest in protecting a nonresident against this out-of-state activity. *Cf. Roy* v. *North American News Alliance Inc.*, 106 N.H. at 97, 205 A.2d 844. Moreover, even if we consider statutes of limitations "procedural," we can still note that statutes of limitations in general—and certainly in plaintiff's home state—penalize a plaintiff who sleeps on her rights, as has Ms. Keeton, and provide defendant publishers security against lawsuits so long delayed. *See, e.g., Gregorie* v. *G. P. Putnam's Sons*, 298 N.Y. 119, 125, 81 N.E.2d 45 (1948); *Morrison* v. *National Broadcasting Co.*, 19 N.Y.2d 453, 459, 280 N.Y.S.2d 641, 227 N.E.2d 572 (1967). To allow a multistate defamation suit here would thwart such policies by exposing a publisher to the risk of suit covering all damage suffered everywhere as long as there is any state anywhere with a statute of limitations that has not yet expired. *Cf.* Martin, Constitutional Limitations

for Choice of Law, 61 Cornell L.Rev. 185, 223 & n.124 (1976). Whatever small interest New Hampshire might have in awarding damages to a nonresident for New Hampshire injuries is outweighed by these other policies —at least here, where the in-state activity is so small a part of the total activity upon which the suit is based.

For these reasons, we believe that the small amount of New Hampshire activity does not sufficiently distinguish this case from *Seymour* to warrant a different result. We note that the Fifth Circuit has also held that an out-of-state plaintiff cannot sue an out-of-state publisher who has sent his publication into the forum state. *Curtis Publishing Co.* v. *Birdsong, supra. See Comment,* 67 Colum.L.Rev. 342, 363-64 (1967); Note, 45 Tex.L.Rev. 188 (1966). While we accept this case as support, we do not decide that an out-of-state plaintiff can never sue an out-of-state publisher for damage inflicted when his publication is sent into the forum state. Rather, considering this case on the individual facts alleged in the complaint, *cf. World-Wide Volkswagen Corp., supra*, we decide here only that the New Hampshire tail is too small to wag so large an out-of-state dog.

Affirmed.

APPENDIX

As to the personal defendant, N.H.R.S.A. 510:4(1) establishes:

> Any person, who is not an inhabitant of this state, and who in person or through an agent transacts any business within this state, commits a tortious act within this state, or has the ownership,

> use or possession of any real or personal property situated in this state, submits himself or his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from or growing out of the acts enumerated above.

Jurisdiction over the corporate defendants is based on N.H.R.S.A. 300:11(c) [300:14] which in its relevant part states:

> If a foreign corporation makes a contract to be performed in whole or in part by either party in New Hampshire, or if such foreign corporation commits a tort in whole or in part in New Hampshire, such acts shall be deemed to be doing business in New Hampshire by such foreign corporation and should be deemed equivalent to the appointment by such foreign corporation of the secretary of the state of New Hampshire and his successors to be its true and lawful attorney upon whom may be served all lawful process in any actions or proceedings against such foreign corporation arising from or growing out of such contract or tort.

Constitutional and Statutory Provisions

Constitution of the United States

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

• • •

AMENDMENT IV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Hampshire R.S.A. 644:11—Criminal Defamation

I. A person is guilty of a misdemeanor if he purposely communicates to any person, orally or in writing, any information which he knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule.

II. As used in this section "public" included any professional or social group of which the victim of the defamation is a member.

Constitution and Statutory Provisions

New York CPLR §302(a)(2)(3)

Personal Jurisdiction by Acts of Non-Domiciliaries

(a) *Acts which are the basis of jurisdiction.* As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:

• • •

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce;

FILED
APR 11 1983
ALEXANDER L. STEVAS,

No. 82-485

IN THE

Supreme Court of the United States

October Term, 1982

KATHY KEETON,

Petitioner,

vs.

HUSTLER MAGAZINE, INC., LARRY FLYNT, LFP, INC., and L.F.P., INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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Petition for Certiorari filed September 14, 1982
Certiorari Granted January 24, 1983

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Judgment of the District Court for the District of New Hampshire, filed June 19, 1981 ..... 1a

Opinion of the Court of Appeals for the First Circuit, entered June 16, 1982 ..... 11a

No. 82-485

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1982.

KATHY KEETON,

Petitioner,

vs.

HUSTLER MAGAZINE, Inc., LARRY FLYNT, LFP, Inc. and L.F.P., Inc.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Chronological List of Relevant Docket Entries.

October 21, 1980—Plaintiff's Complaint filed in U.S. District Court for District of New Hampshire.

November 4, 1980—Plaintiff's Motion to Amend Complaint granted and Amended Complaint filed.

Chronological List of Relevant Docket Entries

December 15, 1980—Defendants' Motion to Quash Service of Process and to Dismiss for Lack of Personal and Subject Matter Jurisdiction and Venue, and for Insufficiency of Process, and for Alternative Relief.

December 30, 1980—Plaintiff's Objection to Defendants' Motion to Quash Service of Process; to Dismiss for Lack of Personal and Subject Matter Jurisdiction and Venue; and for Insufficiency of Process.

January 6, 1981—Plaintiff's Addendum to Plaintiff's Objection.

April 9, 1981—Hearing on motion to dismiss.

June 18, 1981—Opinion of the District Court granting defendants' motion to dismiss.

June 19, 1981—Judgment of District Court entered dismissing plaintiff's complaint.

June 25, 1981—Plaintiff's notice of appeal filed.

June 16, 1982—Opinion of the Court of Appeals for the First Circuit affirming the dismissal of plaintiff's complaint.

Plaintiff's Complaint, Filed October 21, 1980.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW HAMPSHIRE.

(Title omitted in printing.)

1. Plaintiff is a resident of the City and State of New York.

2. Defendant Hustler Magazine, Inc. is an Ohio corporation with a listed principal place of business at 36 West Gay Street, Columbus, Ohio, and with offices at 2029 Century Boulevard, Los Angeles, California, and is engaged in the business of publishing a magazine known as "Hustler Magazine" which is and was at all relevant times circulated throughout all of the states of the United States, including the State of New Hampshire and throughout major countries of the world.

3. Defendant Larry C. Flynt resides at 364 St. Cloud, Bel Air, California, and has a place of business at the offices of Hustler Magazine, Inc. at 2029 Century Boulevard, Los Angeles, California, and is the publisher, owner and editor of the defendant, Hustler Magazine, Inc., and established at all relevant times the content of Hustler Magazine, including, but not limited to, the direction and control over a certain illustration (attached as Exhibit A) knowing and intending that such illustration would be displayed in Hustler Magazine.

4. Defendant, LFP, Inc. is registered as a foreign corporation in the State of California with a corporation number 922871 and has listed as agent for service, Otto

Mueksch of 2029 Century Park East, Suite 3800, Los Angeles, California 90061 and is, on information and belief, the successor corporation of L.F.P., Inc., an inactive California corporation incorporated on January 27, 1975, which is believed to have had general supervisory control over Hustler Magazine, Inc. at all times relevant to the allegations claimed herein.

5. Defendant L.F.P., Inc. is an Ohio corporation with its principal place of business listed as 36 West Gay Street, Columbus, Ohio, with offices at 2029 Century Boulevard, Los Angeles, California, and is the parent corporation of the defendant, Hustler Magazine, Inc. and, as such, is responsible for the content and tone of Hustler Magazine.

6. The above-mentioned defendants had long before May, 1976, and have continued to date to publish, edit, deliver and sell thousands of Hustler Magazines per month within the State of New Hampshire and, specifically, the May, 1976 issue of Hustler Magazine was sold to several thousand purchasers within the State of New Hampshire between April 1 and May 4, 1976.

7. As a result of the distribution and offering for sale of the May, 1976 issue of Hustler Magazine, the above-mentioned defendants committed a tortious act within the State of New Hampshire by offering for sale and selling thousands of Hustler Magazines containing a certain cartoon which was false and defamatory of the plaintiff.

8. The amount in controversy exceeds Ten Thousand Dollars ($10,000) as is required by 28 USC §1332.

Plaintiff's Complaint, Filed October 21, 1980

9. In or about May, 1976, the defendants published in Hustler Magazine a cartoon and caption concerning the plaintiff, a copy of which is marked Exhibit A, attached hereto and incorporated herein by reference.

10. In or about May, 1976, the defendants published in the aforesaid Hustler Magazine the following words:

> "Lissen you Pope-baiting, angel-faced greaseball! You don't need Vaseline to make yer camera fuzzy and romantic; just smear on a muff full of this runny clap you gave me!"

Said words were published in context with a cartoon depicting, in identifiable form, the plaintiff, Kathy Keeton.

11. In the context of said publication, the plaintiff, Kathy Keeton is depicted as having a loathsome disease.

12. The matter so published is false and defamatory.

13. At the time of such publication, the defendants knew that the matter was untrue, and in publishing such false and defamatory matter, the defendants were actuated by actual malice and wrongfully, recklessly, maliciously, wantonly and willfully intended by said publication to injure the plaintiff.

14. The defendants' wrongful intent and wanton and malicious purpose are further evidenced by prior innuendo and statements published by defendants in issues of Hustler Magazine published prior to the May, 1976 issue.

Plaintiff's Complaint, Filed October 21, 1980

15. By reason of the said publication of the false and defamatory matter of and concerning the plaintiff, plaintiff was injured in her good name and suffered pain, mental anguish and humiliation, and was injured in her business and has been held up to contempt, reproach and ridicule, and has been irreparably injured in her reputation.

WHEREFORE, the plaintiff, Kathy Keeton, prays for compensatory damages against the defendants in the amount of Forty Million Dollars ($40,000,000), together with "enhanced compensatory damages" which may be allowed under New Hampshire law against the defendants for their malicious and intentional infliction of injury on the plaintiff in the amount of Forty Million Dollars ($40,000,000), her reasonable attorneys' fees and her costs herein expended; and plaintiff prays for such other and further relief to which she may be entitled.

Respectfully submitted,

W. MICHAEL DUNN, ESQUIRE
SHEEHAN, PHINNEY, BASS & GREEN,
Prof. Ass'n.
1000 Elm Street
Manchester, New Hampshire 03101
(603) 668-0300

Of counsel:
NORMAN ROY GRUTMAN, Esquire
Grutman & Schafrann
505 Park Avenue
New York, New York 10022
(212) 888-1900

Plaintiff's Complaint, Filed October 21, 1980

Demand for Jury Trial.

Plaintiff demands trial of this cause by a jury.

W. MICHAEL DUNN

Plaintiff's Complaint, Filed October 21, 1980



Plaintiff's Amended Complaint, Filed November 4, 1980.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW HAMPSHIRE.

(Title omitted in printing.)

Count II

16. Paragraphs 1 through 5 of the initital Complaint in the above-captioned matter are herein repeated with the same force and effect.

17. The above-captioned defendants had, on or before September, 1975, up to and including July, 1976, and continuing to date, published, edited, delivered and sold thousands of issues of Hustler Magazine per month within the State of New Hampshire; specifically, the following issues of Hustler Magazine were sold to several thousands of purchasers within the State of New Hampshire: September, 1975; October, 1975; The Best of Hustler #2 (published in the latter part of 1975); and July, 1976.

18. As a result of the distribution, sale and offering for sale of the above issues, the defendants committed tortious acts within the State of New Hampshire by maliciously, intentionally and falsely identifying a 50-year old model posing in the nude to be the plaintiff, Kathy Keeton.

19. The 50-year old model identified by defendants as Kathy Keeton was known by them not, in fact, to be the plaintiff, and further, the centerfold depiction and other photographs of the model were deliberately placed within the September, 1975 issue of Hustler Magazine as an intentional

act to embarass the plaintiff, Kathy Keeton, and to hold her up to public obloquy and ridicule.

20. At the time of the September, 1975 publication, the defendants knew the photographs of the female model were not those of the plaintiff, Kathy Keeton, and further, the defendants knew the model's true name which, in no way, was similar to the name of the plaintiff.

21. The defendants further defamed the plaintiff by indicating in the text above a photograph of the nude model that Kathy Keeton stated:

> " 'This is the time of my life.' says Kathy Keeton, who past the half century mark this past June. 'I can have my pick of men, depending on my mood—the mature, experienced guy if I'm into a sweet leisurely fuck, or the young muscular stud, if I want a rip-snorting sweathog work-out!' After spending her career in magazine publishing, Kathy Keeton had been semi-retired in Georgia—until we asked her to pose for our centerfold. 'I used to work for a magazine like HUSTLER, but not as good,' says Kathy, 'and I always wanted to pose . . . But I think the Publisher—like many men—was hung up on teeny-boppers. That's his mistake!' We agree."

22. Such statements were known to the defendants not to be statements made by the plaintiff; however, defendants intended by innuendo to use such statements to further identify the plaintiff with the photographs by representing that the model was a former employee of a man's magazine when, in fact, they knew the plaintiff was

associated with Penthouse Magazine, and further knew that many of defendants' readers knew plaintiff to be so associated.

23. The defendants further defamed the plaintiff, Kathy Keeton, by falsely representing that the plaintiff made the following statements:

> " '. . . I shucked my virginity 35 years ago—before many of my present day lovers were born! The circumstances aren't important now. All I know is that I wanted sex then, and got it, and loved it. And I've been wanting it, and getting it, and loving it ever since . . . Don't sing any 'September Song' for me—with all the sex I'm getting, I never felt so alive!' "

24. The defendants, in addition to the 8-page feature contained in the September 1975 issue of Hustler Magazine (attached as Exhibit B) published, as part of the feedback section of Hustler Magazine, in October of 1975, a photograph of the same individual whom they again falsely identified as Kathy Keeton. (This photograph and feedback section are attached as Exhibit C.) Further, the defendants, toward the latter part of 1975, published "The Best of Hustler #2" wherein they reprinted many of the photographs which appeared in the September, 1975 issue in an article entitled "Kathy Keeton—Who Says You're Over the Hill at 50". (These photographs are attached as Exhibit D.) The defendants again, in July of 1976, in Hustler Magazine at page 13, republished a smaller version of the original September, 1975 centerfold and indicated "readers roared approval over Kathy

Keeton, the foxy 50-year old centerfold", (photograph and accompanying text attached as Exhibit E).

25. At the time of the publications, the defendants knew that the photographs and accompanying stories and statements did not represent either statements or depictions of the plaintiff, Kathy Keeton, and in publishing such false and defamatory matters, the defendants were actuated by actual malice and wrongfully, recklessly, maliciously, wantoningly and willfully intended by such publications to injure the plaintiff.

26. The defendants' wrongful intent and wanton and malicious purposes were further evidenced by the fact that a reader of Hustler Magazine mailed in his photograph to Hustler with a letter indicating that he wanted to meet the "50-year old centerfold". Hustler Magazine promptly forwarded his letter to the plaintiff, Kathy Keeton, thus demonstrating that, in the minds of Hustler Magazine's personnel, the lewd photographs which appear as Exhibits B through E were unlawfully intended to be held out to the public to be photographs of the plaintiff, Kathy Keeton.

27. By reason of the publications of the false and defamatory material listed above, the plaintiff was injured in her good name and suffered pain, mental anguish and humiliation, and was injured in her business and has been held up to contempt, reproach and ridicule, and has been irreparably injured in her reputation.

28. The amount in controversy exceeds Ten Thousand Dollars ($10,000), as is required by 28 USC §1332.

Plaintiff's Amended Complaint, filed November 4, 1980

WHEREFORE, the plaintiff, Kathy Keeton, prays for compensatory damages as to Count II against the defendants in the additional amount of Forty Million Dollars ($40,000,000), together with enhanced compensatory damages which may be allowed under New Hampshire law against the defendants for their malicious and intentional infliction of injury on the plaintiff in the amount of Forty Million Dollars ($40,000,000), her reasonable attorneys; fees and her costs herein expended; and plaintiff prays for such other and further relief to which she may be entitled.

Respectfully submitted,

W. MICHAEL DUNN, ESQUIRE
SHEEHAN, PHINNEY, BASS & GREEN,
Prof. Ass'n.
1000 Elm Street
Manchester, New Hampshire 03101
(603) 668-0300

Of counsel:
NORMAN ROY GRUTMAN, Esquire
Grutman & Schafrann
505 Park Avenue
New York, New York 10022
(212) 888-1900

Demand for Jury Trial.

Plaintiff demands trial of this cause by a jury.

W. MICHAEL DUNN, Esquire

Exhibits A, B, C, D and E, Attached to Plaintiff's Amended Complaint.

(Reproduced at following pages 15a to 33a.)

HUSTLER

FOR THE MEN OF THE WORLD

EXCLUSIVE

FIFTY-YEAR-OLD CENTERFOLD

CONVERSATION WITH

IN DEPTH LOOK AT

GEORGE WALLACE

THE PEOPLE'S

RELUCTANT

CHOICE

$1.75

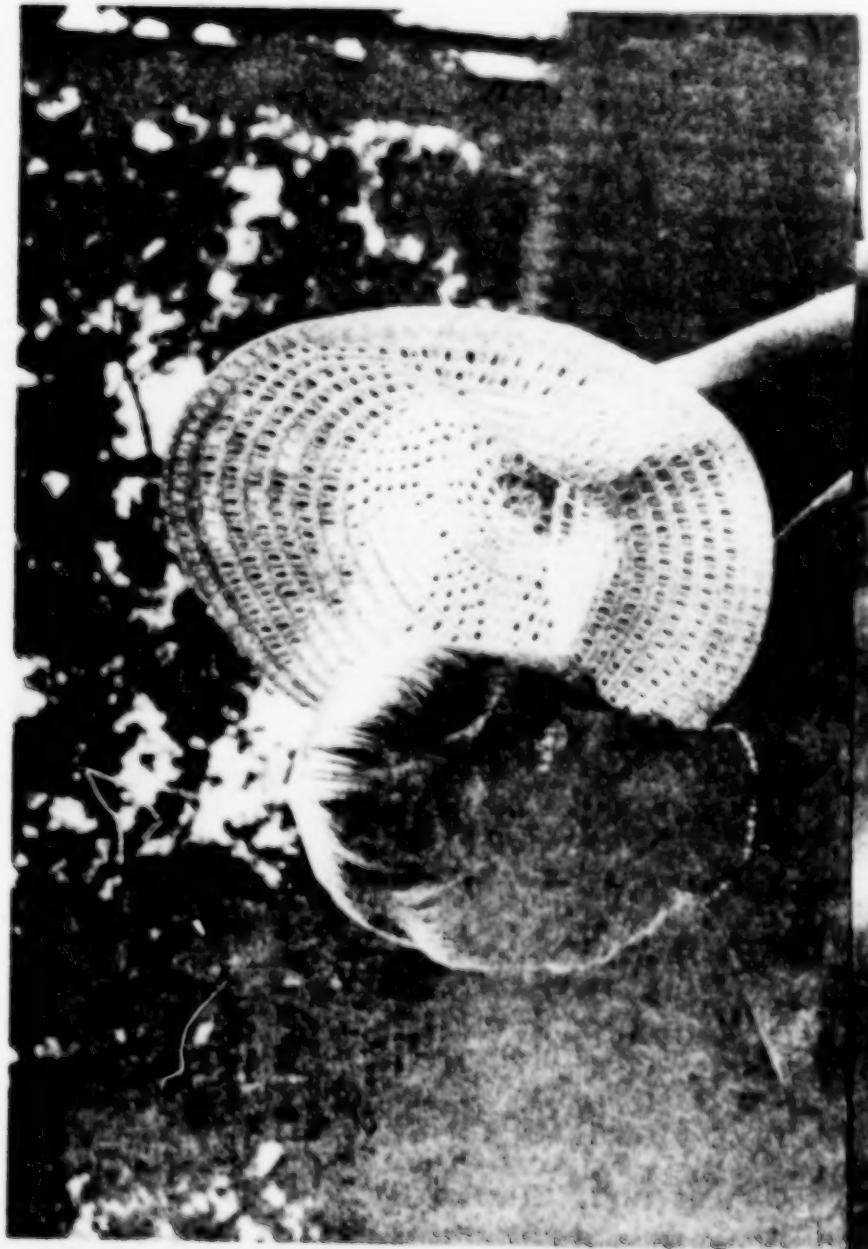

HUSTLER
VOL. 2 NO. 6 SEPT. 1975







20a



21a










HUSTLER
FOR THE REST OF THE WORLD
$3.75
POLYGAMIST
ALEXANDER JOSEPH'S
LIFE WITH 13 WIVES
T. RUSTY CALLEY--
WHERE TO FROM
MY I.A.I?
PLAINTIFF'S
EXHIBIT
7

FEEDBACK





THE BEST OF HUSTLER #2

THE YEAR IN REVIEW

MORE JACKIE O IN THE NUDE

BUTCH AND FEMININE BLACK ON WHITE IN COLOR

OUR 50 YEAR OLD HUSTLER HONEY

HALF-MAN HALF-WOMAN

SHAVED BEAVER



THE BEST OF HUSTLER

BITS & PIECES

A collection of outrageous assaults, insults and put-ons from HUSTLER's famous eye-gouging insanity section.

SEX PLAY

In a short span of time, the practice of tiel fucking has moved into the spotlight of sexual experimentation. HUSTLER gives this latest kink a short-arm inspection.

EVELYN

For sheer erotic impact, our home-town girl is the year's standout — or should we say stand-up? And on top of everything else, she's really a beautiful broad.

MANNY & FAYE

M. V. Clayton's powerful tale of young lovers trapped by a sadistic and vengeful society is a gut-tightening view of a world that might just come to pass.

BARE BEAVER

She was beautiful in all her blonde pubic glory, what would she be like with every blonde, curly hair teasingly shaved off? Better than ever!

HANK WILLIAMS, JR.

Growing up in daddy's footsteps is sometimes the outline for personal tragedy, and the late Hank Williams's son's story seems to prove it.

KATHY KEETON

Over the hill at 50? Not for this fiery lady, whose fine boobs and pubes could make a lot of teenagers pee green with envy.

SCREWING *SCREW*

HUSTLER Executive Editor Bruce David traveled to Wichita, Kansas, to observe the obscenity trial of *Screw* Publisher Al Goldstein. His report on that hectic party details what is clearly the beginning of a fresh assault on our personal liberties.

A DAY IN THE LIFE OF A GYNECOLOGIST

It's all swabs, tests, sterile pokings and proddings, right? Wrong. Our gyno crosses the barrier from science to sensuality with a wet and willing patient.

NEVER FUCK WITH KARMA

In this tour de force, Harold Norse creates a not-so-typical dirty old man who, when not too busy trying to get laid, writes poetry and fucks with the mind of his newly found child-woman. That sure is some kind of karma!

LIZ RAY

A cheap prostitute who sold her favors for $14,000 a year to the most powerful men in Congress, she wound up bringing down Congressman Wayne Hays's world. See the loose lips that sank Hays's ship.

JACKIE O

The twice-widowed jet setter is still the hottest subject in the gossip pages, and HUSTLER is happy to offer yet another viewing of the nude photos of Jacqueline Kennedy Onassis.

BUTCH AND HIS GEORGIA PEACH

This pictorial of a black stud (and that is an understatement when you get an eyeful of his horsecock) and his hung-up Georgia peach drew tons of mail as well as a ton of male penis envy. Move over, porno stars, there's new meat in town.

CHESTER THE MOLESTER

HUSTLER's put-on pervert — the creation from the padded brain cells of our Humor and Cartoon Editor Dwaine B. Tinsley — is a real grabber in this cartoon vignette of a day at the submarine races.

HUSTLER HUMOR

Tinsley again, this time picking the absolutely raunchy best gut busters from recent humor pages.

GETTING IT UP FOR THE GAME

Does balling screw you up for football? Curt Richards investigates this question and finds some wild, satirical answers.

TORRID TINA

Tina's ego, a tigress who gets it off by getting it out — her body, that is, for one and all to enjoy. So enjoy!

MOTHERHOOD

To some, a pregnant woman's swollen body is something to be hidden by layers of clothing. But to HUSTLER, she is beautiful and this taboo-shattering pictorial will show you why.

THE FARMER'S DAUGHTER

The first appearance of this pubescent beauty in our "Adolescent Fantasy" pictorial triggered a storm of controversy. Now she is back home on the farm, as ripely lush as ever — and you'll find that she raises more than just beans and squash.

PAT, THE FUCKING ULTIMATE

Words are simply wasted in this pictorial.

JOE — er — ah — JOSEPHINE

You gotta see it to believe it. To help convince all the doubters, here she ... er, he ... oh, well, here it is again.

KINKY KORNER

The kind of chicks this drummer uses gives off a different sound when he sticks it to a sorority slut.








HUSTLER
ANNIVERSARY ISS
LIFE-SIZE CENTERFOL
FOR THE REST OF THE WORLD
JULY 1976 $2.25
SUPER
BICENTENNIAL
EDITION

Defendants' Motion to Quash Service of Process and to Dismiss for Lack of Personal and Subject Matter Jurisdiction and Venue, and for Insufficiency of Process, and for Alternative Relief, Filed December 15, 1980.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW HAMPSHIRE.

(Title omitted in printing.)

Without otherwise entering appearance herein, the Defendants each specially move this Honorable Court, pursuant to the provisions of 28 U.S.C. §§1391, 1404(a), 1406(a), and Rules 12(b)(1), (2), (3), (4), and (5), *Fed. R. Civ. Proc.*, for dismissal of this action and of the Complaint and Amended Complaint.

The Plaintiff is and at all pertinent times has been a citizen of New York, having absolutely no cognizable nexus with New Hampshire. The Defendants are an individual California resident, and two California-headquartered corporations. At the times of publication of the *Hustler* issues in question, the said Defendants resided or had their principal place of business offices in the State of Ohio.

Under all the circumstances pertinent to the Plaintiff's filing in this Court, lack of subject matter and personal jurisdiction, improper venue, insufficiency of process and of the service thereof, each and all require dismissal of this action.

The State of New Hampshire, through this federal district has no interest in this litigation which will be served by permitting it to be maintained here.

The defendants each alternatively and secondarily move for a change of the venue of this action pursuant to the

provisions of Title 28 U.S.C. §§1391, 1404(a), and 1406(a). The proper federal district or state courts for the filing of this action, if any there be, *arguendo*, are located only in the State of California or in the State of New York.

The defendants also ask that service of process upon each of them be quashed.

The law, the principles of fair play and substantial justice by which the law shall be interpreted, and the ground of *forum conveniens*, all require that the within motions be granted.

Movants submit the following Memorandum, documents and affidavits in support of this Motion.

WIGGIN & NOURIE
Amoskeag Bank Building
Manchester, New Hampshire 03101
(603) 669-2211

By DORT S. BIGG, Esquire
By JEFFREY B. OSBURN, Esquire

BROWNFIELD, BOWEN, BALLY & STURTZ
140 East Town Street
Columbus, Ohio 43215
(614) 221-5834

By C. WILLIAM BROWNFIELD, Esquire
Attorneys for the Defendants

Affidavit of Jim Kohls, Sworn to November 26, 1980.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW HAMPSHIRE.

(Title omitted in printing.)

Now comes Jim Kohls, first being duly cautioned and sworn, and of his own knowledge and belief deposes and states as follows:

1. He is the vice president of operations of the defendant, L.F.P., Inc. At all pertinent times he has resided in Los Angeles, California.

2. That the defendant, L.F.P., Inc. is the correct corporate designation for one of the corporate defendants herein and there is no corporation known as LFP, Inc. and this Affidavit is made on behalf of L.F.P., Inc. and LFP, Inc.

3. Defendant, L.F.P., Inc. is a corporation duly organized and existing under the laws of the State of Ohio and at all times pertinent herein until mid 1978 had its principal place of business at 40 West Gay Street, Columbus, Ohio and since mid 1978 has had its principal place of business at 2029 Century Park East, Suite 3800, Los Angeles, California.

4. Defendant, L.F.P., Inc. is a bonafide holding company existing pursuant to laws of the State of Ohio and has no other assets other than the stock of the various subsidiary corporations which it owns including another of the corporate defendants herein, Hustler Magazine, Inc.

Affidavit of Jim Kohls, Sworn to November 26, 1980.

5. Defendant, L.F.P., Inc. publishes nothing and has no control be it directly or indirectly over the editorial content of the publication involved herein, Hustler Magazine.

6. All of the corporate meetings, whether those of its shareholders or directors, or of its officers in the ordinary course of business of the defendant, L.F.P., Inc. are held solely in the State of California. No officer, director or shareholder of the defendant, L.F.P., Inc. is or at any pertinent time has been a resident of the State of New Hampshire.

7. Defendant, L.F.P., Inc. employs no salesmen in the State of New Hampshire and indeed employs no salesmen at all and solicits no sales within the State of New Hampshire or any other state in the United States.

8. Defendant, L.F.P., Inc. does not transact or conduct business in the State of New Hampshire and has no business activity whatsoever in the State of New Hampshire.

9. Defendant, L.F.P., Inc. is not licensed and is not required to be licensed as a foreign corporation in the State of New Hampshire, inasmuch as no business is transacted or conducted by said corporation in the State of New Hampshire.

10. Defendant, L.F.P., Inc. has not registered or licensed any product, service or trade name in the State of New Hampshire.

11. Defendant, L.F.P., Inc. owns no real estate or personalty located in the State of New Hampshire.

Affidavit of Jim Kohls, Sworn to November 26, 1980.

12. Defendant, L.F.P., Inc. rents no warehouse, office, or other space in the State of New Hampshire; utilizes no vehicles or other forms of transporation to conduct any business within the State of New Hampshire; is listed in no telephone directory in this judicial district or in the State of New Hampshire and maintains no bank or savings accounts in the State of New Hampshire.

13. In summation, the defendant, L.F.P., Inc. has absolutely no contact of any nature with the State of New Hampshire.

14. Each of the foregoing facts is true not only at the present time but just as accurately pertains to all times relevant to these proceedings as described in the Complaint.

Further Affiant saith naught.

JIM KOHLS

(Jurat omitted in printing.)

Affidavit of Larry Flynt, Sworn to November 26, 1980.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW HAMPSHIRE.

(Title omitted in printing.)

Now, comes Larry Flynt, first being duly cautioned and sworn, and of his own knowledge and belief deposes and states as follows:

1. He is and at all relevant times hereto has been the publisher of Hustler Magazine. At all pertinent times he has resided until mid 1978 in Columbus Ohio and currently resides in Los Angeles, California.

2. He is the individual defendant named in this action.

3. He does not transact or conduct any business in the State of New Hampshire and has no business activity whatsoever in the State of New Hampshire.

4. He owns no real estate or personalty located in the State of New Hampshire.

5. He rents no warehouse, office, or other space in the State of New Hampshire; utilizes no vehicles or other forms of transportation to conduct any business within the State of New Hampshire; is listed in no telephone directory in this district or in the State of New Hampshire; and maintains no bank or savings accounts in the State of New Hampshire.

6. He has never resided in the State of New Hampshire, has never owned a home in the State of New Hampshire

and has never leased or rented an apartment or home in the State of New Hampshire.

7. In summation, defendant has had absolutely no contact with the State of New Hampshire.

8. Each of the foregoing facts is true not only at the present time but just as accurately pertains to all times relevant to these proceedings as described in the Complaint.

Further Affiant saith naught.

LARRY FLYNT

(Jurat omitted in printing.)

Affidavit of Larry Flynt, Sworn to November 26, 1980.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW HAMPSHIRE.

(Title omitted in printing.)

Now comes Larry Flynt, first being duly cautioned and sworn, and of his own knowledge and belief deposes and states as follows:

1. He is and at all relevant times hereto has been the publisher of Hustler Magazine, the magazine involved herein and is and at all relevant times hereto has been the chairman of the board of one of the corporate defendants herein, Hustler Magazine, Inc. At all pertinent times he has resided until mid 1978 in Columbus, Ohio and since that time and currently resides in Los Angeles, California.

2. Defendant, Hustler Magazine, Inc. wholly owns and publishes Hustler Magazine; the principal business office of said corporate defendant, Hustler Magazine, Inc. was located until mid 1978 at 40 West Gay Street, Columbus, Ohio and is currently located at 2029 Century Park East, Suite 3800, Los Angeles, California. Defendant, Hustler Magazine, Inc. is incorporated under the laws of the State of Ohio. All of its corporate meetings, whether those of its shareholders or directors, or of its officers in the ordinary course of business were held until mid 1978 within the State of Ohio and since mid 1978 in the State of California. No officer, director or shareholder of Hustler Magazine, Inc. is or at any pertinent time has been a resident of New Hampshire.

Affidavit of Larry Flynt, Sworn to November 26, 1980

3. Hustler Magazine, Inc. employs no salesmen in the State of New Hampshire and indeed employs no salesmen at all, and solicits no sales within the State of New Hampshire except as it is done through the appearance of said magazine itself as sold in interstate commerce.

4. Hustler Magazine, Inc. does not transact or conduct business in the State of New Hampshire, and except as herein noted has no business activity whatsoever in the State of New Hampshire.

5. Hustler Magazine, Inc. is not licensed and is not required to be licensed as a foreign corporation in the State of New Hampshire, inasmuch as no business is transaction or conducted by said corporation in the State of New Hampshire.

6. Hustler Magazine, Inc. has not registered the name of Hustler Magazine as a trade name in the State of New Hampshire and has not otherwise registered or licensed any product or service in the State of New Hampshire.

7. Hustler Magazine, Inc. owns no real estate or personalty located in the State of New Hampshire, with the sole exception, as to personalty, being those Hustler Magazines being periodically sold in New Hampshire through the means of distribution referred to above.

8. Hustler Magazine, Inc. rents no warehouse, office, or other space in the State of New Hampshire; utilizes no vehicles or other forms of transportation to conduct any business within the State of New Hampshire; is listed in no telephone directory in this district or in the State of New

Hampshire; and maintains no bank or savings accounts in the State of New Hampshire.

9. All subscriptions sales of Hustler Magazine are approved in the California office of Hustler Magazine, Inc.

10. All retail sales of Hustler Magazine are handled by a distribution network through wholesalers and retailers totally independent from Hustler Magazine, Inc.; further Hustler Magazine, Inc. has no ownership interest, either directly or indirectly, of any nature whatsoever with said wholesalers and retailers located in the State of New Hampshire.

11. Referring to the issues of Hustler Magazine involved herein, that is, the September, 1975 issue and the May, 1976 issue gross revenues from the sale of said magazines in New Hampshire constituted less than 1% of its total sales in the United States.

12. Other than the foregoing, Hustler Magazine, Inc. has absolutely no contact with the State of New Hampshire.

13. Each of the foregoing facts is true not only at the present time but just as accurately pertains to all times relevant to these proceedings as described in the Complaint.

Further Affiant saith naught.

LARRY FLYNT

(Jurat omitted in printing.)

Affidavit of Robert A. Adelman, Sworn to December 19, 1980.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW HAMPSHIRE.

(Title omitted in printing.)

Now comes Robert A. Adelman, first being duly cautioned and sworn, and of his own knowledge and belief deposes and states as follows:

1. He is the general counsel of the defendant, Hustler Magazine, Inc. At all pertinent times he has resided in Los Angeles, California.

2. That he has made a thorough and exhaustive search of the business records, kept in the ordinary course of business, of the defendant, Hustler Magazine, Inc.

3. That, pursuant to his review of the business records of the defendant, Hustler Magazine, Inc., he states that during the time period in question as alleged in the plaintiff's complaint and amended complaint, the defendant, Hustler Magazine, Inc. had no affiliates, subsidiaries, or any ownership interest of any nature whatsoever with any entities in the State of New Hampshire.

4. That, pursuant to his review of the business records, he states that during the time period in question as alleged in the plaintiff's complaint and amended complaint, the defendant, Hustler Magazine, Inc. derived no advertising revenues from advertisers located in the State of New

Hampshire nor were any advertisements placed from persons or entities known to be residing or located in the State of New Hampshire.

5. That, pursuant to his review of said business records, the September, 1975 and October, 1975 issues of Hustler Magazine were printed by Great Eastern Color of Poughkeepsie, New York and that the May, 1976 and July, 1976 issues of Hustler Magazine were printed by Dayton Press, Inc. of Dayton, Ohio.

6. That, except for the plaintiff, Robert Guccione, and the employees of Penthouse Magazine and its affiliated magazines, all witnesses which would be expected to be called by the defendants and all exhibits which would be utilized by the defendants are located in the State of California. Several of the witnesses to be called by the defendant, Hustler Magazine, Inc. are no longer employees of the defendant, Hustler Magazine, Inc. and are not subject to their call as witnesses except under subpoena.

7. That one of the other defendants, Larry Flynt, is a paraplegic and is only ambulatory through the use of a wheelchair. Further, that the defendant, Larry Flynt, is under the constant care and treatment of numerous medical practitioners all located in Los Angeles, California and further, the defendant, Larry Flynt, because of his medical condition and paraplegia is prevented from traveling from his residence in Los Angeles, California or from

Affidavit of Robert A. Adelman, Sworn to December 19, 1980

any other situs, at which he may, from time to time, receive treatment or care for said medical condition.

Further Affiant saith naught.

ROBERT A. ADELMAN

(Jurat omitted in printing.)

Affidavit of C. William Brownfield, Sworn to December 19, 1980.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW HAMPSHIRE.

(Title omitted in printing.)

Now comes C. William Brownfield, first being duly cautioned and sworn and deposes and states as follows:

1. He is and at all pertinent times has been co-counsel for the defendants in the Ohio litigation referred to in defendants Memorandum in Support, to which this affidavit is attached, both in the trial and appellate proceedings.

2. Of his personal knowledge, affiant verifies that each of the Exhibits, with the exception of Exhibit C, attached to defendant's Memorandum in Support are true and accurate copies of Exhibits, or of transcripts of proceedings, filed and/or part of the record in the aforesaid Ohio cases, under Franklin County Common Pleas Court Case No. 77CV-05-1692, or Franklin County Court of Appeals Case Nos. 80CV-204 and 80CV-375. With respect to Exhibit C to said Memorandum, Affiant verifies that it is a true and accurate photocopy of a transcript of a portion of the deposition of plaintiff Keeton, taken under due notice and process.

3. Affiant further states that he has drafted and reviewed the factual portions of defendant's said Memorandum in Support, and he hereby verifies the truthfulness of

such facts as asserted as if each of them has been fully rewritten in this affidavit.

Affiant, further, sayeth naught.

C. WILLIAM BROWNFIELD

(Jurat omitted in printing.)

Exhibit B to Defendants' Memorandum in Support—Excerpts from Penthouse Magazine.



A Public Service of This Magazine & The Advertising Council

Bill Cosby says: "When you learn CPR, you're ready to save lives-anywhere."



American Red Cross

PENTHOUSE

The International Magazine for Men/January 1981

Worldwide sales 5,350,000*

EDITOR & PUBLISHER BOB GUCCIONE
EDITORIAL DIRECTOR JAMES GOODE
ART DIRECTOR JOE BROOKS
ASSOCIATE PUBLISHER KATHY KEELEY
SECRETARY-TREASURER ANTHONY GUCCIONE
SENIOR VICE PRESIDENT MARIANNE HOWARTH
SENIOR VICE PRESIDENT JOHN EVANS
CHIEF FINANCIAL OFFICER BERNARD SAMS
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Advertising Offices: New York, 909 Third Avenue, New York, N.Y. 10022. Telephone (212) 752-8100. Chicago, 500 North Michigan Avenue, Chicago, Illinois 60611. Telephone (312) 467-0670. Los Angeles, 8484 Wilshire Boulevard, Suite 900, Los Angeles, California 90211. Telephone (213) 653-8100. Detroit, 1249 Washington Boulevard, Detroit, Michigan 48226. Telephone (313) 961-3939. Atlanta, 1776 Peachtree Street, N.W., Atlanta, Georgia 30309. Telephone (404) 892-2626.

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Foreplay fever

I am an 18 year old male and, unlike most people, have always believed that the letters in "Forum" were true. Again, unlike most people, I've always known that someday I would have a story published in "Forum."

I am living at home with parents who believe very strongly that sex is wrong unless the two people are married. So, naturally, the roof fell in when they found out I had a sex life.

One sunny day last April, I was discussing my family problems with a good friend of the family, a beautiful redhead named Emily. She is six years older than I (24 years old) and has always been like a big sister to me. When I told her that my parents were upset that I was having sex, I think it turned her on to find out that her "little brother" was not as innocent as she thought. Emily's parents were expecting me to come out and spend a week working on their farm during the summer. That May day when Emily said good-bye, she looked deep into my eyes and softly said, "I'm really looking forward to seeing you out on the farm this summer." I could've sworn I felt a mixture of love and lust beaming from her fiery eyes, but I told myself I was just imagining things.

During the next two months I spent many evenings masturbating while fantasizing about Emily. I was about to burst with sexual tension when at last that hot June day came. I was on a bus only two hours away from the girl of my fantasies. It's a good thing I didn't know what was in store for me, or I would've shot my load right there on the bus.

When I got off the bus, she was waiting for me. Her shorts revealed long, tanned legs. Her braless tits were like two doves hiding in the bushes, as her nipples poked softly but sensuously through her terry cloth shirt. We met in a warm embrace, as would a brother and sister. But my feelings were far from brotherly when I felt her firm tits pressed against my chest.

On the way home from the bus, we stopped at a park. As we lay on the green grass, Emily confided in me that she had been raped at an early age. She had led an active sex life but had never enjoyed sex. She felt that all the guys who made love to her were just using her for their own pleasure.

I told her that when I make love to a girl I concentrate on pleasuring her and that half my pleasure is having a girl intoxicated with ecstasy. Later that day she told me that she had always dreamed to have me for a lover. I told her that the feelings were mutual and tried to contain my throbbing dick in my shorts.

As soon as we got home, she suggested that she show me around. Once behind the barn, we held each other tight. As our lips met, her tongue probed my mouth. My hands caressed her body, lingering at her firm ass. I kneaded her buns, one in each hand, while I pressed her bush against my hard cock. She was driving me wild with her hand on my bare leg. As she inched her way up the leg of my shorts, I let one hand slip up her shirt. By the time my skilled hands reached her tits, she was softly stroking the head of my dick through my underpants. I longed to feel her hand on it.

My hands were making slow circles on the supple skin of her breasts, taking care not to touch her nipples yet. As the circles became faster and closer to her nipples, my desire to see her silken breasts grew stronger. I lifted her shirt to find two of the most perfectly shaped tits I had ever seen. Her erect nipples were the best part. They were like two ripe cherries just waiting to be picked. I wasted no time in sucking one of them into my mouth.

I nibbled and sucked until both nipples were as hard as they could get. Then I took off my shirt and held Emily tight so that her warm, erect nipples were pressing against my chest. Her hips were moving in circles against my throbbing cock. She began to purr like a kitten when my hand started to wander up the inside of her thigh. I slipped my hand up her shorts and let one finger slip inside her panties. My finger softly brushed her pussy hair just long enough to drive her crazy. Then, having not even touched the hot flesh of her pussy, I pulled my finger back out of her panties, which drove her even crazier.

I wanted to feel her hot cunt so bad! But knowing that Emily had never enjoyed sex with a guy before, I was going to take extra care to make sure she enjoyed it with me. So I was planning on getting her so hot and frustrated that she would beg me to put it in. If I could only wait that long, I knew she would enjoy it. So I suggested we get back home.

The next week I spent from 6:00 a.m. to 8:00 p.m. doing farm work. So Emily and I could barely snatch a few intimate moments together each day. But they were enough to keep us turned on 24 hours a day for the whole week.

One of the nights was one night after dinner, when we went out and parked. As she lay in my arms, I held her tight and

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Exhibit C to Defendants' Memorandum in Support—Excerpt from Deposition of Kathy Keeton

IN THE

COMMON PLEAS COURT

OF FRANKLIN COUNTY, OHIO.

ROBERT C. GUCCIONE, *et al.*,

Plaintiffs,

against

HUSTLER MAGAZINE, Inc., *et al.*,

Defendants.

Case No.: 77 CV-04-1692

Deposition of KATHY KEETON, taken by Defendants, pursuant to Order of Honorable Justice J. Craig Wright, at the offices of Grutman and Scharann, Esqs., 505 Park Avenue, New York, New York, on Thursday, August 23, 1979 at 10:08 o'clock in the forenoon, before Charles Shapiro, a Certified Stenotype Reporter and Notary Public within and for the State of New York.

* * *

Exhibit C to Defendants' Memorandum in Support—
Excerpt from Deposition of Kathy Keeton

(8) please.

KATHY KEETON, having been first duly sworn by the Notary Public, was examined and testified as follows:

Examination by Mr. Sturtz:

Q. For the record, will you state your full name, please, and spell it.

A. Kathryn, K-a-t-h-r-y-n, Merle, M-e-r-l-e, Keeton, K-e-e-t-o-n.

Q. Miss Keeton, where do you reside at this time?

A. At No. 8 East 63rd Street.

Q. In New York City?

A. Yes.

Q. Do you go by the name of Kathy Keeton?

A. Yes.

Q. Miss Keeton, you and Mr. Guccione have filed a suit in the Common Pleas Court in Franklin County against Hustler Magazine and Mr. Larry Flynt. I am the attorney for the magazine and Mr. Flynt. I wish to inquire of you concerning the allegations in the complaint and other matters relevant to those matters. My purpose is to find out what your position is, what your story is. I do not try and use trick

Exhibit E to Defendants' Memorandum in Support—Decision of the Court of Appeals of Franklin County, Ohio, Rendered September 30, 1980.

IN THE

COURT OF APPEALS

OF FRANKLIN COUNTY, OHIO

ROBERT C. GUCCIONE, *et al.*,

Plaintiffs-Appellees and Plaintiffs-Appellants,

v.

HUSTLER MAGAZINE, Inc., *et al.*,

Defendants-Appellants and Defendants-Appellees.

No. 80 AP-204

Decision

Rendered on September 30, 1980

Grutman & Schafrann, Mr. Norman Roy Grutman, Mr. Jeffrey H. Daichman, of Counsel, 505 Park Avenue, New York, New York 10022, and Vorys, Sater, Seymour &

Exhibit E to Defendants' Memorandum in Support—Decision of the Court of Appeals of Franklin County, Ohio, Rendered September 30, 1980

Pease, Mr. Herbert R. Brown, Mr. C. William O'Neill and Mr. Duke W. Thomas, of Counsel, 52 East Gay Street, Columbus, Ohio 43216, For Plaintiffs-Appellees (Appellants).

Brownfield, Bowen, Bally & Sturtz, Mr. C. William Brownfield, Mr. Lyman Brownfield, Mr. Laurence E. Strutz, Mr. George R. McCann, of Counsel, 140 East Town Street, Columbus, Ohio 43215, For Defendants-Appellants (Appellees).

WHITESIDE, J.:

This matter involves two separate appeals from separate orders of the Franklin County Court of Common Pleas, with respect to which that court made findings of no just cause for delay in accordance with Civ. R. 54(B).

One appeal is by plaintiffs from an order dismissing count two of plaintiffs' second amended complaint for the reason that the claim was not commenced within the time provided by the applicable statute of limitations. In support of this appeal, plaintiffs raise a single assignment of error as follows:

> "The trial court erred in granting defendants' motion to dismiss Count II of the Amended Complaint on the ground that it was barred by the New York statute of limitations."

The other appeal is by defendants from an order of the trial court pursuant to Civ. R. 30(G) awarding to plaintiffs expenses and attorneys fees in connection with the failure

of defendant Larry Flynt to appear for the taking of his deposition in Los Angeles, California, on February 11, 1980. In support of this appeal, defendants raise two assignments of error as follows:

> 1. "The trial court erred and abused its discretion in awarding, pursuant to Ohio Civil Rule 30(G), unreasonable attorneys' fees to one of plaintiffs-appellees' attorneys at the rate of $185.00 per hour."
>
> 2. "The trial court erred in computing its award of attorneys' fees to plaintiffs-appellees solely on the basis of the hours expended times the lawyer's hourly rate, and in failing to require additional evidence on the issue of the proper amount of such fees."

Considering first the appeal by plaintiffs, it appears uncontested that count two of plaintiffs' amended complaint attempts to set forth a claim for relief for invasion of privacy as provided by Section 51, New York Civil Rights Law. The parties do not contest the trial court's finding that the substantive law of New York applies to this claim.

Unlike Ohio law, under New York law there is no common-law right of privacy, for invasion of which an action may be maintained for damages. Rather, to the extent that a right of privacy is recognized under New York law, it is strictly a statutory right unknown at common law and provided by Section 51, New York Civil Rights law, providing in pertinent part as follows:

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> "Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. • • •"

The issue before us is whether the New York statute of limitations with respect to the New York statutory action should be applied rather than the appropriate Ohio statute of limitations. The trial court applied the New York statute.

Ordinarily, statutes of limitations are considered procedural, and the statute of the forum state will be applied even though the claim for relief arose in another state. The rule is well stated in Restatement of Conflict of Laws 2d 396, Section 142, as follows:

> "(1) An action will not be maintained if it is barred by the statute of limitations of the forum, including a provision borrowing the statute of limitations of another state.

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> "(2) An action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state, except as stated in §143."

There is, however, as noted in the restatement, an exception to the general rule that statutes of limitations are procedural so that that of the forum state will be applied, which is stated in Restatement of Conflict of Laws 2d 400, Section 143, as follows:

> "An action will not be entertained in another state if it is barred in the state of the otherwise applicable law by a statute of limitations which bars the right and not merely the remedy."

There is little Ohio authority upon the issue of when a statute of limitations of another state will be construed to bar the right, rather than merely the remedy. Perhaps this is because of the existence until 1965 of the borrowing statute set forth in former R. C. 2305.20, which provided that, where a cause of action arose in another state, the statute of limitations of that state would be applied if it provided for a lesser number of years than the statutes of this state. The borrowing statute, former R. C. 2305.20, was repealed in 1965, with no substitution being made therefor. Accordingly, prior to 1965, there was no need for judicial determination in Ohio of whether a statute of limitations of another state barred the right, rather than the remedy, since the statute of the state in which the claim for relief arose would be applied in any event if it provided

for a lesser number of years than the appropriate Ohio statute. New York also has a borrowing statute, Section 202, New York Civil Practice Law and Rules, likewise making it unnecessary for judicial construction of application of the rule set forth in Restatement of Conflict of Laws 2d 400, Section 143, *supra*. The issue of whether a statute of limitations bars the right rather than the remedy arises very infrequently with respect to the statutes of the forum state.

In *Pittsburg, Cincinnati and St. Louis Railway Co. v. Hine* (1874), 25 Ohio St. 629, it was recognized that, with respect to statutes creating claims for relief unknown in the common law, a statute of limitations bars the right rather than merely the remedy, at least where enacted by the same act which created the right of action. A similar conclusion was reached in *McVeigh v. Fetterman* (1917), 95 Ohio St. 292, even though the statute of limitations applied was contained in a different section than that creating the right of action, it being stated at pages 294-295 of the opinion as follows:

> "No right exists to maintain an action to contest a will except as it is specifically provided by statute, and the right thus conferred is subject to the conditions and limitations imposed. The right granted and the condition imposed go together; the one cannot be enjoyed without the restrictions and limitations of the other."

Similarly, in *Castrovinci v. Castrovinci* (1952), 93 Ohio App. 133, the general rule was recognized, the court stating at page 138:

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> "• • • where by statute a right of action is given which did not exist by the common law, and the statute giving the right fixes the time within which the right may be enforced, the time so fixed becomes a limitation or condition on such right, and will control, no matter in what forum the action is brought • • • ."

In this case, the New York statute of limitations is not contained in the same act which created the limited statutory claim for invasion of privacy but, instead, is contained in another act enacted some years later. Apparently, Section 51, New York Civil Rights Law was enacted in 1909.

No special statute of limitations was enacted at that time, so that apparently the applicable statute of limitations was that pertaining to actions to recover upon a liability imposed by statute. See present Section 214(2), New York Civil Practice Law and Rules. In 1938, however, New York enacted a special statute of limitations applicable to actions brought for an invasion of privacy pursuant to Section 51, New York Civil Rights Law. Although adopted by a specific act, the act added actions for violations of the right of privacy to a section enumerating various actions required to be commenced within one year. Thus, present Section 215, New York Civil Practice Law and Rules provides as follows:

> "The following actions shall be commenced within one year:
>
> "• • •

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> "3. an action to recover damages for • • • a violation of the right of privacy under section fifty-one of the civil rights law;
>
> "• • •."

The trial court found this section to be applicable to count two of the amended complaint as one barring the right, not merely the remedy. Plaintiffs contend that the trial court erred because the statute of limitations is not contained in the same act which created the right of action but, instead, is contained in a separate section enacted some years later. Plaintiffs particularly take exception to the comment of the trial court that:

> "The peculiar facts of this case militate toward a policy-based decision in keeping with simple justice and the modern-day trend toward applying limitations on actions in force at the locale of the alleged tort."

The trend may be true; however, it is evinced by borrowing statutes, not by judicial decision. Ohio, on the other hand, had a borrowing statute for many years but repealed it in 1965, as discussed *infra*, indicating a legislative intent contrary to the trend indicated by the trial court.

However, the trial court did not rely solely upon "a policy-based decision" but also relied upon *Myers v. Alvey-Ferguson Co.* (6th Circuit, 1964), 331 F.2d 223, quoting extensively from that case, including the statement that:

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> " '• • • A limitation in a separate statute of the creating state may be a part of the substantive law, if in express terms it is made applicable to the liability created by statute.• • •' "

Among the cases cited by the *Myers* court in support of this statement is *Maki v. George R. Cooke Co.* (6th Circuit, 1943), 124 F.2d 663; 146 A.L.R. 1552, in which the statute of limitations of the state which created the statutory liability was applied, even though it was a general statute of limitations and prescribed a longer period for bringing the action than the applicable statute of the forum state. The *Maki* court stated in part, at pages 1355-1356:

> "We see no valid reason why, if a state creates by statute a right nonexistent at common law and prescribes in the same statute a limitation period for action which by comity will be applied in the forum of a sister state, a limitation, though found in a separate statute of the creative state made applicable in express terms to actions commenced upon a liability created by statute, should not likewise be recognized and applied in the courts of the forum state. • • • "

It appears, however, that full faith and credit does not compel the forum state to apply the statute of limitations of the state where a statutory claim for relief arose. See *Wells v. Simonds Abrasive Co.* (1953), 345 U.S. 514; 73 S.Ct. 856, in which it is stated at page 517:

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> "The rule that the limitations of the forum apply (which this Court has said meets the requirements of full faith and credit) is the usual conflicts rule of the states. However, there have been divergent views when a foreign statutory right unknown to the common law has a period of limitations included in the section creating the right. The Alabama statute here involved creates such a right and contains a built-in limitation. The view is held in some jurisdictions that such a limitation is so intimately connected with the right that it must be enforced in the forum state along with the substantive right.
>
> "* * *
>
> "* * * Differences based upon whether the foreign right was known to the common law or upon the arrangement of the code of the foreign state are too unsubstantial to form the basis for constitutional distinctions under the Full Faith and Credit Clause."

It follows from *Wells* that Comment (b) to Restatement of Conflict of Laws 2d 400, Section 143, correctly states the applicable principle, as follows:

> "Application of the rule of this Section depends upon the local law of the forum. It is for the courts of each state to determine the circumstances in which the rule is applicable. So the forum will

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> determine in accordance with its own conceptions whether a statute of limitations of a second state bars the right and not merely the remedy."

Both *Myers* and *Maki, supra,* relied upon *Davis v. Mills* (1904), 194 U.S. 451, in which Justice Holmes stated as follows at pages 454-456:

> "• • • the ordinary limitations of actions are treated as laws of procedure and as belonging to the *lex fori,* as affecting the remedy only and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg,* 119 U. S. 199. *But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction.* It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. *The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right.*
>
> "• • •

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> "• • • we think that this §554 so definitely deals with the liability sought to be enforced that upon the principles heretofore established it must be taken to affect its substance so far as it can, *although passed at a different time from the statute by which that liability first was created.* • • • " (Emphasis added.)

In *Zang v. Railway Express Co.* (1935), 130 Ohio St. 17, the Ohio Supreme Court cited *Davis* but in a case wherein the limitation was contained in the same section creating the right, it being commented at page 20 of the opinion, as follows:

> "There is a marked distinction between pure statutes of limitation affecting the remedy only which must be specially pleaded as a defense, and special statutory limitations taking away the right itself. In the latter class, time is of the essence of the right, and the lapse of the prescribed period in which an action may be commenced wholly extinguishes the right. • • •"

From *Davis*, it follows that to be such a statute (one barring the right itself), it is not necessary that the statute of limitations be contained in the same statute, or the same act, which creates the right, nor even that it be enacted at the same time that the right was created. A subsequently enacted statute of limitations contained in a separate section will be construed to bar the right, rather than merely the remedy, with respect to a claim unknown at common law created by statute, where it is specifically directed to

the liabaility created by statute. Thus, Justice Holmes in *Davis, supra,* with respect to the statute therein involved, stated at page 455:

> "A further difference is that, while there might be difficulties in construing the general limitation upon actions for penalties as going to the right, this section is so specific that it hardly can mean anything else. • • •"

The New York statute of limitations is as specifically directed to the right of privacy, unknown in New York common law but created by the statute, as was the statute of limitations in *Davis* toward the statutorily created right involved therein. As noted, there is a specific reference in the New York statute to "a violation of the right of privacy under Section 51 of the Civil Rights Law." Nothing could be more specific. No general statute of limitations applicable generally to statutorily created liabilities is involved. Furthermore, the legislative history as attached to plaintiffs' brief indicates that this provision was specifically enacted to apply specifically to the New York statutory right of privacy, rather than being merely part of a comprehensive statute of limitations enactment, even though the statute of limitations was created by amendment to a pre-existing section of the New York Code pertaining to statute of limitations for various enumerated actions. The attachment to plaintiffs' brief indicates that the 1938 act first establishing a statute of limitations for violation of the statutory right of privacy was entitled, "An Act to Amend the Civil Practice Act in

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Relation to Limitation of Time to Commence Certain Actions." Section 1 of the act provided as follows:

> "Section forty-nine of the civil practice act, is hereby amended by adding thereto a new subdivision, to be subdivision eight, to read as follows:
>
> "An action to recover damages for a violation of the right of privacy under section fifty-one of the civil rights law."

Section 2 of the act related to previously accured rights of action to recover damage for a violation of the right of privacy and provided that such actions "must be commenced within three years from the time this act takes effect, and all such actions not so commenced shall be thereafter completely and forever barred for lapse of time."

Accordingly, we conclude that the New York statute of limitations is so specifically directed to the statutorily created right of privacy, unknown to New York common law, as to constitute a bar to the right and not merely a bar to the remedy, even though enacted by a separate statute enacted many years subsequent to the adoption of the original statute creating the New York right of privacy.

Furthermore, it is unclear as to which Ohio statute of limitations would be applied if the New York statute be deemed to bar the remedy, rather than the right. It is questionable that the four-year limitation of R. C. 2305.09(D) is applicable. Rather, the appropriate Ohio limitation would appear to be either the six-year limitation of R. C.

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2305.07 with respect to actions upon liabilities created by statute or the one-year limitation of R. C. 2305.11 with respect to actions upon a statutory penalty or forfeiture, depending upon whether the New York statute creates a penalty or forfeiture or merely a liability. With respect to compensatory damages allowed to be recovered by the New York statute, it is arguable that R. C. 2305.07 applies. It is also arguble, however, that, with respect to exemplary damages permitted by the New York statute, the limitation of R. C. 2305.11 would apply if such damages be construed as constituting a penalty or forfeiture. It is unnecessary to resolve this issue in this case, inasmuch as we conclude that the New York statute of limitations properly applies, along with other New York substantive law, since it is so specifically directed to the New York statutorily created liability as to bar the right, not merely the remedy. It may well be that the four-year limitation of R. C. 2305.09(D) applies with respect to actions upon the Ohio common-law right of privacy. However, in the context of this case, there exists no common-law right of privacy, since the parties concede that the substantive law of New York applies.

We, therefore, find no error on the part of the trial court in applying the one-year New York statute of limitations applicable to actions to recover damages for violation of the statutorily created right of privacy since such right is unknown in New York common law, and the statute of limitations is so specifically directed to the statutorily created right, although enacted at a different time by a different act, as to warrant the conclusion that it bars the right, not merely the remedy. Plaintiffs' assignment of error is not well taken.

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With respect to defendants' appeal from the order with respect to award of expenses as sanctions for failure to comply with discovery, we find there to be no appealable order at this time. Ohio law does not contemplate piecemeal appeals. The order imposing sanctions is appealable when a final judgment to which it is applicable is entered. The final judgment entered with respect to the second court of plaintiffs' amended complaint does not constitute such a final judgment as to permit appeal from the sanction order at this time. It will be reviewable upon appeal from the final judgment entered in the action with respect to the remaining claims. In our view, the order remains interlocutory at this time and can be amended by the trial court. If it were reviewable, it might well be necessary to reverse the order since no evidentiary hearing apparently was held with respect to the reasonableness of the attorney fees awarded. Furthermore, in determining the reasonableness of attorney fees, the criteria to be employed is the reasonableness of the fees in the locality of the forum, not the reasonableness of fees in another state, even though an attorney admitted to practice in another state but not Ohio has been permitted to participate as attorney for a party. A party is not entitled to enhance the sanctions which would otherwise be applied for violation of discovery by employing an out-of-state attorney to assist in the prosecution, or defense, of his case, even though such attorney be permitted specially to practice in Ohio with respect to the pending action. This does not mean that a party cannot be awarded attorney fees with respect to the out-of-state attorney but only that the reasonableness of the fees is to be determined in accordance with the standards of the locality of the forum,

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rather than that of some other state. However, we can not finally resolve the issues upon this appeal since there is no appealable order, necessitating dismissal of defendants' appeal.

For the foregoing reasons, defendants' appeal from the order imposing sanctions is dismissed for want of an appealable order, and, with respect to plaintiffs' appeal, the assignment of error is overruled; and the judgment dismissing the second count of the amended complaint is affirmed.

Upon plaintiff's appeal: Judgment affirmed;

Upon defendants' appeal: Appeal dismissed.

STRAUSBAUGH, P.J., and REILLY, J., concur.

Objection to Defendants' Motion to Quash Service of Process; to Dismiss for Lack of Personal and Subject Matter Jurisdiction and Venue; and for Insufficiency of Process, Filed December 30, 1980.

UNITED STATES DISTRICT COURT,
FOR THE DISTRICT COURT OF NEW HAMPSHIRE.

(Title omitted in printing.)

NOW COMES the plaintiff, Kathy Keeton, through her attorneys, Sheehan, Phinney, Bass & Green, and objects to the defendants' Motion to Quash Service of Process; to Dismiss for Lack of Personal and Subject Matter Jurisdiction and Venue; and For Insufficiency of Process, and requests a hearing on same. Plaintiff will provide this Honorable Court with a memorandum in support of its position in accordance with the ten-day provision of Local Rule 11 (b) (2).

Respectfully submitted,

By W. MICHAEL DUNN, ESQUIRE
SHEEHAN, PHINNEY, BASS & GREEN
Prof. Ass'n.
1000 Elm Street
Manchester, New Hampshire 03101
(603) 668-0300

Dated: December 30, 1980.

Of Counsel:

NORMAN ROY GRUTMAN, Esquire
Grutman, Schafrann & Miller
505 Park Avenue
New York, New York 10022
(212) 888-1900

(Certification omitted in printing.)

Addendum to Plaintiff's Objection, Filed January 6, 1981.

UNITED STATES DISTRICT COURT,
FOR THE DISTRICT COURT OF NEW HAMPSHIRE.

(Title omitted in printing.)

NOW COMES the Plaintiff, Kathy Keeton, through her attorneys, Sheehan, Phinney, Bass & Green and states that on December 30, 1980, she filed with this Court an Objection to the Defendant's Motions to Quash Service of Process; To Dismiss For Lack of Personal and Subject Matter Jurisdiction and Venue; and For Insufficiency of Process. Plaintiff further states that through oversight and error but not neglect, her attorney failed to specifically object to the Defendant's additional request for Alternative Relief.

WHEREFORE, Plaintiff requests that she be permitted to add as an addendum to her earlier objection an objection to the Defendant's request for Alternative Relief.

Respectfully submitted,

KATHY KEETON
By her attorneys,

SHEEHAN, PHINNEY, BASS & GREEN,
Prof. Ass'n.

By: PETER S. COWAN
For W. Michael Dunn

Dated: January 5, 1981

(Certification omitted in printing.)

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories.

UNITED STATES DISTRICT COURT,
FOR THE DISTRICT COURT OF NEW HAMPSHIRE.

(Title omitted in printing.)

NOW COMES the plaintiff, Kathy Keeton, and, pursuant to Rule 33 of the Federal Rules of Civil Procedure, propounds the following interrogatories to be answered by the defendant, Hustler Magazine, Inc., under oath:

1. For the period January 1, 1975 through the present, give:
   (a) the identity of the wholesale magazine distributors serving the State of New Hampshire who have distributed Hustler Magazine, including name and address;

   (b) number of issues provided to each such distributor for distribution;

   (c) number of issues actually sold; and

   (d) number of issues returned.

ANSWER: Your defendant objects to this question as being overly burdensome and not being reasonably intended to lead to discovery of relevant discoverable information. Further your defendant objects to providing this information to counsel for the publisher of a competitor magazine.

See Addenda A. Under Addenda A the letter D refers to magazine distributors. The letter R refers to the magazines

returned. The letter S refers to the number of magazines sold.

Your defendant does not represent that the magazines sold as listed within Addenda A were actually sold to retail buyers within the geographical boundaries of the State of New Hampshire. The wholesale magazine distributors listed in Addenda A are distributors that distribute magazines within the State of New Hampshire, but defendant does not represent that distributors distribute solely within the boundaries of the State of New Hampshire.

Your defendant does not have access to records pertaining to distribution to various wholesalers prior to February 1, 1977. Your defendant does not have compilations for sales to distributors after January 1, 1981.

2. To the extent not covered by the answer to Interrogatory No. 1 above, with respect to the following distributors, Manchester News Co., Inc. (Bedford, New Hampshire), G. Paulsen Co. (Concord, New Hampshire), Weinbaum News (Portsmouth, New Hampshire), Verham News (West Lebanon, New Hampshire), Troy News (Nashua, New Hampshire), Merrimack News (Lawrence, Massachusetts), and County News Distributors (Brattleboro, New Hampshire), for the period of January 1, 1975 to the present, give:

(a) the total number of issues provided to each such distributor for distribution;

(b) the number of issues actually sold; and

(c) the number of issues returned.

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories

ANSWER: See answer to #1.

3. For each month from January 1, 1975 through the present, and as to each wholesale magazine distributor mentioned in the answers to Interrogatories No. 1 and No. 2 above, please give:

(a) the number of issues provided to each distributor for distribution;

(b) number of issues actually sold; and

(c) number of issues returned.

ANSWER: Your defendant objects to this interrogatory as being overly broad, burdensome and not reasonably intended to lead to the discovery of relevant information. See Addenda A.

4. With regard to the May, 1976 issue of Hustler Magazine, state:

(a) The total number of copies provided to each of the above wholesale magazine distributors for distribution;

(b) the number of issues actually sold; and

(c) the number of issues returned.

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories

ANSWER: Your defendant objects to this interrogatory on the basis of relevancy and further objects on the basis that it would be overly broad and puts an undue burden on the defendant to collate adequate information to provide an answer to this question. Your defendant does further state that 8,073 of Hustler Magazines were sold in the State of New Hampshire during the month of May, 1976. Your defendant represents that this information answers this interrogatory in substance.

5. For the period January 1, 1975 through the present, give the issue price of Hustler Magazine and discuss the date and amount of any issue price changes that occurred in said period.

ANSWER: Your defendant objects to this interrogatory for the reason that it is in no way relevant to the jurisdictional and venue issues before this court. On information and belief the price of Hustler Magazine on January 1, 1975 was approximately $1.75 per issue. As of March, 1981 the price of the magazine was increased to $3.50 per issue. The price of the magazine was increased from time to time between January 1, 1975 to March, 1981.

6. In terms of total distribution within the State of New Hampshire, where does Hustler Magazine rank in the order of monthly magazines distributed in this state at present, and how, if at all, has this ranking changed in the period of January 1, 1975 through the present?

ANSWER: Your defendant objects to this question as being overly broad and not relevant to the issues at hand.

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories

Further your defendant states that this information is not available and is not something that is compiled by your defendant organization or any other organization to the defendant's knowledge. The only information available concerning total distribution of Hustler Magazine and its rank in comparison to other monthly magazines is publications that pertain to national distribution. This information cannot be translated into a ranking on a monthly or annual basis.

7. In terms of total sales within the State of New Hampshire, where does Hustler Magazine rank in the order of monthly magazines sold in this state at present, and how, if at all, has this ranking changed in the period of January 1, 1975 through the present?

ANSWER: Your defendant objects to this question for the same reason that it objected to question #6. The question is overly broad and would be an undue burden for the defendant to answer. The defendant is unaware of any source of information that would provide rankings for either distribution or dollar sales on a state basis. Your defendant does not believe that this information is available from any reasonable source.

8. Do you deny that Hustler Magazine is the third largest selling monthly magazine in the State of New Hampshire?

ANSWER: While your defendant does not have any specific New Hampshire statistics, based upon the national placement for sales of Hustler Magazine vis-a-vis

other monthly magazines, your defendant denies that it is the third largest selling monthly magazine in the State of New Hampshire.

9. Identify each individual and/or corporation and/or company and/or other association or organization responsible for distributing Hustler Magazine to the wholesale magazine distributors servicing New Hampshire during the period of January 1, 1975 through the present, and give dates indicating the periods during which any such persons or entities were responsible for such distribution.

ANSWER: Capitol Distributors of Derby, Connecticut, Charleston Building, Derby, Connecticut, From January, 1975 to December 15, 1976; Flynt Distribution Co., Inc., 2029 Century Park East, Suite 2800, Los Angeles, California, From December, 1976 to present.

10. Identify Flynt Distributing Company, Inc. of 2029 Century Park East, Suite 3800, Los Angeles, California, giving names and addresses of directors and of officers, a statement of the corporate purpose, the state where and the date when incorporated, and the entity to Flynt Distributing Co., Inc. is a successor.

ANSWER: Your defendant objects to this question as requesting information not relevant to the issues before this court and not reasonably intended to lead to the discovery of relevant information. Further your defendant objects on the basis that it invades the privacy of others not involved in the case.

Your defendant does disclose that Larry C. Flynt is the director of Flynt Distributors, Co., Inc. Larry Flynt is

chairman of the board and chief executive officer of Flynt Distributors, Co., Inc. Larry C. Flynt is not and never has been a resident of the State of New Hampshire. Further, upon information and belief, none of the other officers of Flynt Distributors, Co., Inc. are or ever have been residents of the State of New Hampshire. Flynt Distributors, Co., was incorporated on April 28, 1976 in the State of Ohio with a principal place of business in Los Angeles, California. Flynt Distributors, Co., Inc. is not a successor corporation to any other corporation.

11. List the titles of magazines distributed by Flynt Distributing Co., Inc. to anyone in New Hampshire, and to whom are they distributed?

ANSWER: Your defendant objects to this question as being overly broad and would create an undue burden upon the defendant to try to collate such a list. This question cannot be reasonably expected to lead to information that would be relevant to the issues at hand or to the case at hand. Further your defendant objects to providing such business information to a competition and represents that such a disclosure of information would be an invasion of defendant's business records. Further your defendant objects on the basis that this question pertaining to Flynt

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories

Distributors, Co., Inc. should not properly be directed to Hustler Magazine, Inc.

Submitted by,

KATHY KEATON
By Her Attorneys

SHEEHAN, PHINNEY, BASS & GREEN
Prof. Ass'n.

By W. MICHAEL DUNN

Dated: January 18, 1981.

HUSTLER MAGAZINE, Inc.

By LARRY FLYNT
(duly authorized)

(Jurat omitted in printing.)

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories

		FEB 1977	MAR 1977	APR 1977	MAY 1977	JUNE 1977	JULY 1977	AUG 1977	Se 19
MANCHESTER NEWS	D	1,200	700	1,200	300	300	1,000	1,000	
MANCHESTER, N.H.	R	89	107	311	9	3	149	350	1
	S	1,111	593	889	291	297	851	650	1
[illegible] CO.	D	50	100	Ø	100	100	100	100	1
[illegible] N.H.	R	Ø	Ø	Ø	Ø	Ø	Ø	Ø	
	S	50	100	Ø	100	100	100	100	
[illegible] NEWS	D	2,600	Ø	3,200	2,600	3,000	3,000	3,600	3
[illegible] N.H.	R	107	Ø	444	459	560	554	624	
	S	2,493	Ø	2,756	2,141	2,440	2,446	2,976	2
F.P. TROJI NEWS	D	3,000	Ø	3,000	4,000	3,500	3,500	4,000	4
NASHUA, N.H.	R	134	Ø	376	363	694	1,667	1,768	2
	S	2,866	Ø	2,624	3,637	2,806	1,833	2,232	1
VERNON NEWS [illegible]	D	3,500	Ø	Ø	3,500	4,000	4,000	4,200	4
[illegible] N.H.	R	396	Ø	Ø	705	1,974	1,045	953	1
	S	3,104	Ø	Ø	2,795	2,026	2,955	3247	3
ROBITAILLE & SON	D								
[illegible] N.H.	R								
	S								
HERALD-[illegible]	D	6,500	6,500	6,500	6,500	6,500	7,000	6,300	7
[illegible], [illegible]	S	1,170	645	1,512	1,610	2,054	2,100	2302	2
	S	5,330	5855	4,988	4,882	4,446	4,900	3,998	4
[illegible] NEWS	D	1,700	Ø	Ø	Ø	2,000	2,200	2,200	2
[illegible]	R	103	Ø	Ø	Ø	962	974	894	
	S	1,597	Ø	Ø	Ø	1,038	1,226	1,306	1
Total									
	D	18550	7300	13900	17,000	19,400	20,800	21,400	2
	R	1,999	752	2,643	3,154	6,247	6,489	6,891	9
	S	16,551	6,548	11,257	13,846	13,153	14,311	14,509	12

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories

		NOV 1977	DEC 1977	JAN 1978	FEB 1978	MAR 1978
MANCHESTER NEWS	D	800	1,000	1,000	1,000	900
MANCHESTER N.H.	C	613	335	385	79	176
	S	187	665	615	921	724
C. PAULSON	D	150	150	150	150	150
CONCORD NH.	C	Ø	1	Ø	Ø	10
	S	150	149	150	150	140
AMERICAN NEWS	D	3,200	3,000	3,000	3,000	3,000
PORTSMOUTH N.H.	C	1,048	721	879	890	928
	S	2,152	2,279	2,121	2,110	2,072
E.P. TRAW	D	4,000	3,500	3,000	3,000	2,700
NASHUA N.H.	R	1,822	1,430	1,049	657	856
	S	2,178	2,070	1,951	2,343	1,844
VERMONT NEWS CORP	D	3,200	3,500	3,500	3,500	3,000
W. LEBANON N.H.	C	763	1,274	1,128	929	592
	S	2,437	2,226	2,372	2,571	2,408
DeRADELLI & SCOTT	D					
NORTH N.H.	C					
	S					
MERRIMACK NEWS	D	7,000	7,000	6,000	6,500	6,000
LAWRENCE, MASS	D	3,006	2,987	2,158	2,879	3,097
	S	3,994	4,013	3,842	3,621	2,903
COUNTRY NEWS	D	1,600	1,600	1,600	1,600	1,600
BRATTLEBORO, VT	R	362	326	312	287	378
	S	1238	1,274	1,288	1,313	1,222
TOTAL	D	19,950	19,750	18,250	18,750	17,350
	C	7,614	7,074	5,911	5,721	6,037
	S	12,336	12,676	12,339	13,029	11,313

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories

		Aug 1978	Sept 1978	Oct 1978	Nov 1978	Dec 1978	Jan 19
[illegible] Record	D	900	900	900	900	900	1,0
	R	183	110	92	155	51	2
	S	717	790	808	745	849	7
[illegible] Falcon	D	250	250	250	300	300	4
	R	4	9	8	7	11	
	S	246	241	250	293	289	34
[illegible] News	D	2,900	2,500	2,400	2,500	2,500	2,1
	R	843	179	223	340	391	4
	S	1,957	2,321	2,177	3,160	2,109	2,1
	D	3,200	2,600	2,500	2,700	2,700	3,
[illegible] News	R	647	240	192	528	259	
	S	2,553	2,360	2,308	2,172	2,441	2,5
	D						
Tico News	R						
	S						
[illegible]	D						
	R						
	S						
Merrimack [illegible]	D	8000	8000	7,500	7500	6,900	6,9
Lawrence Mass	R	3,787	2312	2,822	2,689	2,600	2,3
	S	4,213	5,688	4,678	4,811	4,000	4,4
Country News	D	1,600	1,200	1,200	1,200	1,400	1,4
Brattleboro, VT	R	582	83	226	78	252	41
	S	1,018	1,117	974	1,122	1,148	98
[illegible]		16,750	15,450	14,750	15,100	14,600	15,4
	R	1,046	2,933	3,555	3,797	3,764	4,2
	S	10,704	12,517	11,195	12,303	10,836	11,10

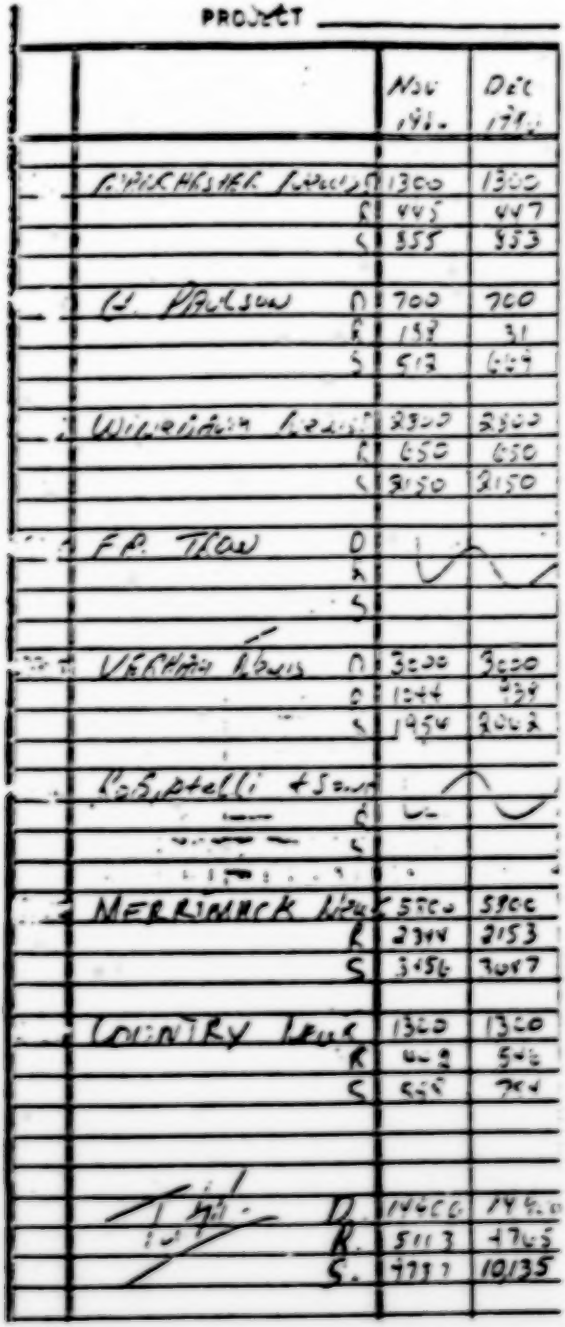
Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories

		May 1974	June 1974	July 1974	Aug 1974	Sept 1974
LITCHESTER NEWS	D		1,100	1,100	1,100	1,100
	R		210	329	249	195
	S		890	771	851	907
C. WILSON	D	400	400	500	500	530
	R	160	42	141	189	147
	S	240	358	359	311	402
WATERMAN NEWS	D		3,000	3,200	3,200	3,200
	R		929	1,026	900	814
	S		2,071	2,174	2,300	2,386
	D	Ø	3,300	3,500	3,500	3,500
LOCUST NEWS	R	Ø	1,319	1,181	903	1,101
	S	Ø	1,981	2,319	2,597	2,399
	D					
TRI-W NEWS	R					
	S					
ANGELELLI & SONS						
	R					
	S					
MERRIMACK NEWS	D	6,500	6,500	6,500	6,500	6,500
LAWRENCE E. WILSON	R	2996	2,435	3,296	2,620	2,000
	S	3,504	4,065	3,204	3,880	4,500
COUNTRY NEWS	D	1,500	1,500	1,200	1,200	1,200
FRANKLIN-BIRCH, VT	R	Ø	538	288	274	239
	S	Ø	962	912	926	961
Total	D	8,400	15,800	16,000	16,000	16,430
	R	3,156	5,473	6,261	5,135	4,496
	S	3,744	10,327	9,739	10,865	11,524

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories

		Feb 1980	March 1980	April 1980	May 1980	June 1980	J 1
		1300	1350	1350	1300	1300	1
		300	338	324	434	471	
		1000	962	1021	961	839	
		650	650	900	900	850	
		190	162	390	212	356	
		460	488	510	515	414	
		3700	3500	3500	3500	3400	
		1544	1576	1469	1583	1553	1
		2154	1964	2031	1917	1847	1
		3500	3900	3500	3500	3400	
		1523	1732	1632	1435	1374	1
		2277	2068	2117	1907	1776	2
		5900	5800	6000	6000	6200	6
		1883	1719	1576	2019	2521	2
		3917	4081	4424	3982	3279	3
		1400	1400	1400	1400	1400	1
		450	477	442	463	443	
		456	921	958	937	757	
		--	--	-			
		16,650	16,500	16,350	16,400	16,000	16
		5950	10,070	5730	6584	7568	6
		10,700	10,430	11,112	10,212	9432	9

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories



PROJECT

		Nov 19[illegible]	Dec 19[illegible]
[illegible]	D	1300	1300
	R	445	447
	S	555	553
[illegible]	D	700	700
	R	197	31
	S	517	669
[illegible]	D	2900	2900
	R	650	650
	S	2150	2150
[illegible]	D		
	R		
	S		
[illegible]	D	3000	3000
	R	1044	939
	S	1956	2062
[illegible]	D		
	R		
	S		
MERRIMACK [illegible]		5900	5900
	R	2344	2153
	S	3456	3747
COUNTRY [illegible]		1300	1300
	R	456	546
	S	644	754
[illegible]	D	14000	14[illegible]
	R	5113	4765
	S	7777	10135

Excerpt from Transcript of Oral Argument in the District Court for the District of Massachusetts, held on April 9, 1981.

UNITED STATES DISTRICT COURT,

DISTRICT OF MASSACHUSETTS.

CA 80-490-C CAFFREY, CH. J.

(Title omitted in printing.)

Appearances:

For the Plaintiff: Norman Roy Grutman, Esq., and Jeffrey H. Daichman, Esq., Grutman, Schafrann & Miller, 505 Park Avenue, New York, New York 10022.

For the Defendant: C. William Brownfield, Esq., Brownfield, Bowen, Bally & Sturtz, 140 East Town Street, Columbus, Ohio, 04315 and Dort S. Bigg, Wiggin & Nourie, 875 Elm Street, Manchester, New Hampshire 03101.

Courtroom No. 1
Federal Building
Boston, Massachusetts

April 9, 1981

• • •

(9/10) there was enough doing business or appearance in in New Hampshire by the de minimis appearance of Hustler Magazine there, while that might help in a certain context to decide whether personal service had been proper, it

Excerpt from Transcript of Oral Argument in the District Court for the District of Massachusetts, held on April 9, 1981

certainly is no substitute for an analysis which I just mentioned and as Hensen v. Denkler requires. Not just that they had some contact with the state, but that the contact which gave rise to the cause of action had a significant nexus with New Hampshire.

Here we have not only three other available fora, but we have no, even the testimony I've given the Court through her previous deposition in the Ohio case shows, no one called her that she knows of, she has no knowledge of any New Hampshire contact. I should point out to you that the only evidence that's before you is the evidence we've presented, with the exception of our answers to interrogatories. There were no affidavits, evidence of any other sort. And the preponderance of the evidence standard does apply.

Our evidence conclusively shows that whatever contact the defendants may have here, and parenthetically, your Honor, I would point out again, LFP is merely a holding company. They were

• • •

(22) not to be confused by Mr. Brownfield's claims that the presence or the connection or the notoriety or the celebrity of the plaintiff is in some way a constitutional or jurisdictional test.

The cases cited by Judge Laughlin and the cases outside of New Hampshire, to which we have referred in our memorandum, make it very plain that the reference and the focus is only on the defendant. And what the defendant's presence in this case is can be derived from such information as the defendants chokingly disclose in the interrogatories. And I don't know whether your Honor has

Excerpt from Transcript of Oral Argument in the District Court for the District of Massachusetts, held on April 9, 1981

been provided with a copy of them. They were just served upon me as I walked into the courthouse.

But what they disclose on the admissions of the circulation of this magazine running from 1975 onward show consistent, not sporadic, substantial and continuous business activity by the defendants who are sued in this case.

Even in this day of soaring inflation, your Honor, 16 to 20,000 copies a month sold on a newstand at $2 the copy, cannot be called as Mr. Brownfield does, de minimus contacts.

Office - Supreme Court, U.S.
FILED
OCT 12 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KATHY KEETON,

Petitioner,

vs.

HUSTLER MAGAZINE, INC., LARRY C. FLYNT, LFP, INC. and L.F.P., INC.

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GREGORY A. HOLMES
P.O. Box 808
Manchester, New Hampshire 03105
603/669-2211
Counsel for Respondents

Of Counsel:
WIGGIN & NOURIE
Dort S. Bigg

Questions Presented

Under the particular facts of this case, is there a sufficient relationship among the parties, the forum, and the litigation in order to justify, under the Due Process Clause, the exercise of personal jurisdiction over these nonresident defendants.

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NO. 82-485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KATHY KEETON,

Petitioner,

vs.

HUSTLER MAGAZINE, INC., LARRY C. FLYNT, LFP, INC. and L.F.P., INC.

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents Hustler Magazine, Inc., Larry C. Flynt, LFP Inc., and L.F.P. Inc., respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the First Circuit Court of Appeals.[1]

Statement of the Case

Petitioner Kathy Keeton, a resident of New York, brought suit in Ohio in May 1977 for invasion of privacy and libel against the same defendants as in the present action. She was joined as plaintiff in that action by Robert C. Guccione, the publisher of *Penthouse* magazine, a rival magazine to *Hustler*. Kathy Keeton and Robert C. Guccione are common-law husband and wife. Keeton is associate publisher and senior vice-president of *Penthouse* magazine and also is the editor of another Guccione-owned magazine known as *Omni*.

The lawsuit was instituted in Ohio because the defendants were located there at that time. Ohio is the state of incorporation for the corporate defendants. The principal place of business for the corporate defendants was Columbus, Ohio. The individual defendant, Larry Flynt, resided in Columbus, Ohio, at the time.

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[1] The following statement is made pursuant to Supreme Court Rule 28.1. The parent company of Hustler Magazine, Inc. is L.F.P., Inc. LFZ Ltd. is a subsidiary of L.F.P., Inc. Flynt Distributing Company, Inc., Flynt Subscription Co., Inc., Flynt Domestic International Sales Corporation, Gentleman's Companion Magazine, Inc., Sex Play Magazine, Inc., and MCA Advertising Co. are corporations affiliated with Hustler Magazine, Inc.

Keeton's Ohio lawsuit concerned the May 1976 issue of *Hustler* magazine. The lawsuit was brought more than one year after the publication of that issue of *Hustler*, so the Ohio trial court in May 1978 dismissed both Guccione's and Keeton's libel claims based on the Ohio statute of limitations of one year. No appeal was filed by either Keeton or Guccione concerning the dismissal of their libel count. Keeton's invasion of privacy claim subsequently was dismissed as barred by the New York statute of limitations, which the Ohio Court considered to be migratory. Unlike the situation involving dismissal of their libel claim, Keeton and Guccione appealed the dismissal of their privacy claims to the Franklin County (Ohio) Court of Appeals. On September 30, 1980, the appellate court affirmed the decision of the trial court. Ms. Keeton did not appeal the case to the Ohio Supreme Court.

By the time Keeton lost her appeal in Ohio, the statute of limitations in every jurisdiction in the country for libel had expired, except for the statute of limitations in New Hampshire, which was six years. The plaintiff filed a complaint in the United States District Court for the District of New Hampshire containing a libel count based on the same publication she alleged was defamatory in her Ohio suit. She later amended her complaint to add an additional count in libel for the September 1975 issue of *Hustler*. The defendants filed a motion to dismiss on the grounds, *inter alia*, that the Court did not have personal jurisdiction over them. The District Court granted the motion based on its lack of personal jurisdiction over the defendants. The District Court found that New Hampshire had only an attenuated relationship with the parties and events in the case so the state had no interest in this litigation. The Court held that the Due Process Clause of the Fourteenth Amendment prevented New Hampshire from exercising jurisdiction over the defendants.

The First Circuit Court of Appeals affirmed the District Court's decision on June 16, 1982. The Court of Appeals analyzed the relationship of the parties and the litigation to the forum, and held that due process would not allow New Hampshire to have jurisdiction over the defendants. The petitioner seeks to have the decision of the Court of Appeals reviewed on the grounds that the Court applied the wrong legal standard to

the facts of the case. The respondents submit that this case does not deserve review by this Court because the Court below applied the correct legal standard to the particular facts of this case.

Summary of the Argument

The decision below is in accordance with the legal standards established by this Court concerning the limitations the Due Process Clause of the Fourteenth Amendment places on a state's exercise of personal jurisdiction. The decision below applied the proper legal standard to the particular facts of the case. This case does not involve a federal question of great public importance. There is no question of law at issue that justifies the granting of a writ of certiorari.

REASONS FOR DENYING THE WRIT

1. THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD TO THE PARTICULAR FACTS OF THIS CASE AND HAS NOT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO REQUIRE THIS COURT TO EXERCISE ITS POWER OF SUPERVISION.

The petitioner claims that the Court of Appeals applied an incorrect legal standard and based its decision solely and merely on the fact that the plaintiff lacks contacts with the forum. Furthermore, the petitioner asserts that no inquiry beyond a defendant's contacts with the forum is permitted. Such an analysis misconstrues the rationale of the decision below and also misstates the law. Contrary to the petitioner's assertions, the Court of Appeals applied the correct legal standard and considered all of the criteria established by this Court under the "fairness" test. The result below is based on the particular facts of this case and does not merit review by this Court.

This Court has held consistently that the basic limitation imposed by the Due Process Clause on personal jurisdiction is "reasonableness" and "fairness", i.e., is it "reasonable" to

require the defendant to defend this lawsuit in the forum under the circumstances of a particular case. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The standard of "reasonableness" recently was given content by this Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980):

> "Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum state's interests in adjudicating the dispute, *see McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); the plaintiff's interests in obtaining convenient and effective relief, *see Kulko v. California Superior Court*, [436 U.S. 84, 92 (1978)], at least when that interest is not adequately protected by the plaintiff's power to choose the forum, *cf. Shaffer v. Heitner*, 433 U.S. 186, 211 n. 37 (1977); the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and the shared interest of the several states in furthering fundamental social policies, *see Kulko v. California Superior Court*, supra at 93."

As the above-language shows, the question of whether due process prohibits the state from exercising jurisdiction over a defendant involves an inquiry into more than the defendant's contacts with the forum. This approach was accepted and followed by the Court of Appeals in its decision. The Court considered the respondents' insignificant contacts with the forum, New Hampshire's lack of interest in the litigation, the fact that the petitioner could have chosen a more appropriate forum if she had not slept on her rights, the policy of having an efficient resolution of alleged multi-state defamation, and the fact that the allegedly defamatory material was not aimed exclusively at New Hampshire. Based on the particular facts of this case, the Court of Appeals held that it would be unfair to allow the plaintiff to sue these defendants in New Hampshire. Other courts have come to similar conclusions in libel cases. *See, e.g., Curtis Publishing Co. v. Birdsong*, 360 F.2d 344 (5th Cir. 1966); *Church of Scientology v. Adams*, 584 F.2d 893 (9th Cir. 1975).

Any reference the Court of Appeals made to the petitioner's lack of contacts with the forum is the result of the Court's analysis of the forum's lack of interest in the litigation. The Court of Appeals did not rest its opinion solely on the fact that the petitioner does not have any contacts with the forum. Rather, the Court of Appeals found that New Hampshire has absolutely no interest in this litigation. A short review of the particular facts of this case will show the reason for the Court's conclusion. The petitioner is a resident of New York and has never resided in New Hampshire. She owns no real or personal property in New Hampshire. Her only contacts with New Hampshire consist of the fact that her name appears in small print in the masthead of three magazines[2] which are distributed in New Hampshire. The lower courts have held that the plaintiff is a stranger to the State of New Hampshire and has no reputation in this State that can be injured:

> "The magazine does not publish her picture and in no way attempts to distinguish her name from that of dozens of other names which appear on the magazine's credits page. Being listed in this litany of unknowns does not make her name a household word here, nor does it create a reputation or image of any kind in New Hampshire. In short, the plaintiff has demonstrated absolutely no connection with the state of New Hampshire. At best the state has only a tenuous generalized interest in the present litigation. Any such interest is shared by the other forty-nine states and the foreign countries where Hustler is circulated." (App. 7a)

As the District Court noted, "the argument that she has acquired a reputation in this State because of the monthly publication of her name in the masthead of *Penthouse* magazine is strained at best." *Id.* No cause of action can be considered to have arisen in New Hampshire if no reputation exists to be injured. Realistically, any injury the petitioner has suffered occurred where she lives and works, which is where this suit should have been brought. Moreover, the petitioner is not convenienced by bringing a suit in New Hampshire. The petitioner admitted

[2] The petitioner's name appeared on the masthead of *Penthouse, Omni* and *Una*. *Una* is no longer marketed.

below that the means of proving her special damages are more readily accessible in New York, the petitioner's domicile. The only reason the petitioner wishes to bring suit in New Hampshire is because she has slept on her rights and has allowed the statute of limitations to expire in every other jurisdiction.

On the other hand, the respondents' contacts with New Hampshire consist merely of sending magazines into that State to be circulated through independent distributors.[5] "Their circulation in New Hampshire amounts to less than one percent of their total circulation in the United States." (App. 13a). The respondents have no offices or space, vehicles, bank accounts, telephones, telephone listings, or a listed address in New Hampshire, and they do not conduct any business in the State. The respondents hold no ownership interest in the wholesalers or retailers who distribute the magazine. All of these factors, which were considered by the Court of Appeals, show the miniscule amount of activity in the forum by the defendants. There is no rationale nexus between New Hampshire, the parties, or the injury. Any injury to the petitioner's reputation occurred outside New Hampshire. More than ninety-nine percent of the allegedly defamatory magazines were circulated outside New Hampshire. The only conceivable interest New Hampshire might have in the present case would be to protect its citizens against reading allegedly defamatory material distributed in New

[5] The petitioner asserts on page 9 of her brief that a certain number of copies of the relevant issues of Hustler were circulated in New Hampshire. Although certain statistics were supplied by the defendant through discovery, the figures used by the petitioner are not part of the record. The petitioner is extrapolating these figures from other figures in the record. Also, the calculations the petitioner performs on page 9 of her brief are not supported by the record. The defendants' answers to interrogatories state the number of copies of the magazine that were shipped to various independent distributors in and near the State of New Hampshire. Some of these distributors apparently service areas both within and without the State. It is impossible to determine the number of copies sold in New Hampshire because the record does not disclose the number of magazines each independent distributor sends into New Hampshire, Vermont or Massachusetts. Furthermore, the petitioner is multiplying the cover price of the magazine by the number of copies sent to the distributor rather than the number of copies actually sold to the public. She also is using the cover price rather than the cost to the distributor, which is 60% of the cover price.

Hampshire about persons not present in New Hampshire. The Court of Appeals recognized that this interest of the forum was too tenuous and generalized to allow the State to exercise jurisdiction over the defendants when nearly all of the activity in the case took place outside of New Hampshire.

As can be seen, the Court of Appeals considered many factors in its decision and did not focus solely and merely on the petitioner's lack of contacts with the forum. The consideration by the Court of the petitioner's lack of contacts with the forum in connection with its analysis of the forum's lack of interest in the litigation is not inconsistent with this Court's teachings and is not in contravention of *Rush v. Savchuk*, 444 U.S. 320 (1980), as the petitioner asserts. The plaintiff in that case was from Minnesota and the defendant was from Indiana. A lawsuit arose out of an accident in Indiana, and the plaintiff sued the defendant in Minnesota under the doctrine of *Seider v. Roth*, 16 NY.2d 111 (1966), by attaching the insurance company's obligation in Minnesota. The defendant had no contacts with the forum, but the forum had a substantial interest in the litigation due to the fact that the plaintiff was a resident of the forum. The language quoted by the petitioner refers to this Court's holding that a forum's strong interests in protecting a plaintiff is not sufficient to allow jurisdiction over a defendant which has no contacts with the forum. This Court in *Rush v. Savchuk id.* did not hold that the forum state's interest in the litigation is not an important factor for purposes of jurisdiction. Rather, the court held that the forum state's interest in the litigation is not by itself sufficient to allow personal jurisdiction where the defendant does not have the requisite minimum contacts with the forum. The language from the opinion quoted by the petitioner is not applicable to this case.

An important principle the Court of Appeals recognizes is that the question of personal jurisdiction must be decided on the particular facts of each case. As stated by this Court: "If a defendant has certain judicially cognizable ties with the state, a variety of factors *relating to the particular cause of action* may be relevant to the determination of whether the exercise of jurisdiction would comport with 'judicial notions of fairplay and substantial justice.'" *Rush v. Savchuk*, 444 U.S. 320, 332 (1980)

(emphasis supplied). Therefore, very little can be gained by comparing the facts of this case to facts of other cases. For instance, the petitioner claims that *Galonis v. National Broadcasting Company*, 498 F.Supp. 789 (D.N.H. 1980), is "jurisdictionally indistinguishable" from the case at hand. However, a review of that case shows that the defendants did not even challenge personal jurisdiction. Moreover, the defendants in that case were significantly engaged in activities in New Hampshire on a continuing basis, including having affiliated radio stations in New Hampshire and sending representatives into the state. Both *Curtis Publishing Co. v. Golino*, 383 F.2d 586 (5th Cir. 1967), and *Gill v. Fairchild Hiller Corp.*, 312 F.Supp. 916 (D.N.H. 1970) involve factual situations where the forum's interest in the litigation was significant due to the fact that the plaintiff was a resident of the forum and the defendant had substantial contacts with the forum.

Accordingly, the Court of Appeals applied the proper legal standards to the particular facts of this case and decided that fairness dictates that the petitioner not be allowed to maintain her action in New Hampshire. The petitioner seasonably could have brought her libel actions in Ohio or New York.[4] However, she chose to allow the statute of limitations to expire in those states and now is asking this Court to allow her to forum shop for a state that is disinterested in her litigation. The petitioner's assertion that the Court of Appeals applied an improper legal standard or focused on the wrong factors in its decision is without merit.

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[4] Petitioner notes on page 15 of her brief that she cannot bring her cause of action for defamation in New York because New York's long-arm statute does not allow service on a non-resident for a defamation action. Petitioner does not deny that she could have brought an invasion of privacy action in New York. By her own admission, she could have recovered substantially the same damages in an invasion of privacy action as in a defamation action. Moreover, although not part of the record in the district court, the corporate defendants were qualified to do business in New York at that time, so they could have been sued in New York. However, New York has a one year statute of limitations for libel, the same time limit as Ohio. Since the petitioner was too late in filing her suit in Ohio, she also slept on her rights in New York. Also, if the petitioner wishes to complain about the long-arm statute in New York, she should direct her request for relief to the New York legislature, which has decided not to protect its own citizens, rather than to the courts of New Hampshire. *Curtis Publishing Co. v. Birdsong*, 360 F.2d 544, 547 n. 5 (5th Cir. 1966).

2. THE DECISION OF THE COURT OF APPEALS IS LIMITED TO THE PARTICULAR FACTS OF THIS CASE AND DOES NOT INVOLVE A QUESTION OF SUCH PUBLIC IMPORTANCE THAT THIS COURT NEEDS TO REVIEW IT.

The petitioner claims that the decisions of the courts below should be reviewed by this Court because those decisions have "far-reaching consequences" for nonresident plaintiffs. The respondents submit that the courts below did nothing more than apply the well-known principles of due process to the particular facts of this case. The decisions below do not have an impact on all nonresident plaintiffs and do not establish any new principles of law. The decision of the Court of Appeals affects only the parties to this action. This case is not one which deserves review by this Court.

The Court of Appeals recognized that it was not establishing a new legal standard and that nonresident plaintiffs are not barred, as a general rule, from suing nonresident defendants:

> "While we accept this case as support, we do not decide that an out-of-state plaintiff can never sue an out-of-state publisher for damage inflicted when his publication is sent into the forum state. Rather, considering this case on the individual facts alleged in the complaint, *cf. World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 386 (1980), we decide here only that the New Hampshire tail is too small to wag so large an out-of-state dog." *Keeton v. Hustler Magazine, Inc.*, 682 F.2d 33, 36 (1982).

This statement by the Court of Appeals conforms with the recognized principle that jurisdiction is to be decided on the "factors relating to the particular cause of action. . . " *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). One need only to review the cases involving libel to see that each case stands on its own facts. *See e.g. Church of Scientology of California v. Adams*, 584 F.2d 893 (9th Cir. 1978); *Anselmi v. Denver Post, Inc.*, 552 F.2d 316 (10th Cir.), *cert. denied sub nom. Times Mirror Co. v. Anselmi*, 432 U.S. 911 (1977); *Curtis Publishing Co. v. Golino*, 383 F.2d 586 (5th Cir. 1967); *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344 (5th Cir. 1966); *David v.*

National Lampoon, 432 F.Supp. 1097 (D.S.C. 1977); *Roy v. North American Newspaper Alliance, Inc.*, 106 N.H. 92, 205 A.2d 844 (1964). Some of the courts in these cases found that the forum had jurisdiction over the defendants, while others held that the forum could not assert jurisdiction over the defendants. Each case turns on the particular facts of the cause of action.

The petitioner asserts that the effect of the decision below is to require a libel plaintiff to bring suit in either the state of his residence or the publisher's state. To the contrary, the decision of the Court of Appeals, which follows the legal principles established by this Court, merely requires a libel plaintiff to bring suit in a state where it is reasonable to do so as a result of "the relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186 (1977). Normally, a libel plaintiff would have a choice of several jurisdictions. For example, the petitioner in this case at least could have brought suit in Ohio or New York. In fact, the petitioner knew that Ohio was an appropriate forum, but she filed suit there too late. She now is seeking to bring suit in New Hampshire merely to circumvent the statute of limitations problem she created herself by allowing the statutes to expire in the appropriate forums. The allowance of this case in New Hampshire would be an open invitation to allegedly defamed plaintiffs to bring their stale claims to New Hampshire. As the Court said in *Seymour v. Parke, Davis & Co.*, 294 F.Supp. 1257, 1260 (D.N.H. 1969), *aff'd* 423 F.2d 584 (1st Cir. 1980), the allowance of a suit "merely to circumvent an unfavorable statute of limitations would inevitably lead to a thorough and complete perversion of fundamental principles of diversity jurisdiction, comity and fairness, a result as illogical as it is unreasonable, and totally lacking in fairness."

Accordingly, this case is not appropriate for review by this Court. The Court of Appeals applied the proper legal standard to a particularized set of facts and concluded that the forum lacked jurisdiction over the respondents. The Court's opinion has no effect on other libel plaintiffs, and the Court so recognized. This case does not present a question of great public importance.

CONCLUSION

The respondents respectively submit that the petitioner has failed to sustain her burden of establishing under Rule 17 that there are special and important reasons why the writ should be granted. The decision below did not apply an incorrect legal standard, but rather the Court of Appeals applied the correct legal standard to the particular facts of this case. The decision does not involve a question of federal law of great public importance which should be settled by this Court. For these reasons the respondents request that the petition for writ of certiorari be denied.

Respectfully submitted,

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FILED
APR 11 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KATHY KEETON,

Petitioner,

vs.

HUSTLER MAGAZINE, INC., LARRY C. FLYNT, LFP, INC. and L.F.P., INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR PETITIONER

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Questions Presented

1. Where the requirements of a state's long-arm statute have been met, and the court would have personal jurisdiction of a suit by a resident plaintiff against the defendants, does the due process clause of the United States Constitution nevertheless prohibit that state from exercising personal jurisdiction over the defendants merely because the plaintiff is not a resident of the forum?

2. Where a plaintiff suffers damages in the forum by activity taking place there, is the right of the forum state to exercise jurisdiction over the wrongdoer for such activity prohibited by the due process clause of the United States Constitution merely because the plaintiff is not a resident of the forum?

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On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals (Pet. 11a-20a) is reported at 682 F.2d 33. The opinion of the District Court (Pet. 2a-8a) is not officially reported.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on June 16, 1982. The petition for a writ of certiorari was filed on September 14, 1982, and was granted on January 24, 1983. The jurisdiction of this Court was invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

The First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States (Pet. 21a), New Hampshire's Criminal Defamation Statute, R.S.A. 644.11 (Pet. 21a) and the relevant portion of New York's long-arm statute (Pet. 22a) are set out in their entirety in the appendix to the petition. New Hampshire's long-arm statutes, R.S.A. 300:11-15 and R.S.A. 510:4 are appended in full to the opinion of the Court of Appeals (Pet. 19a-20a).

Statement of the Case

In April 1977, Kathy Keeton, a resident of New York, brought an action in the Franklin County Court of Common Pleas of Ohio for libel and invasion of privacy against Hustler Magazine, Inc. and its publisher, Larry C. Flynt. She was joined as plaintiff in that action by Robert C. Guccione, the publisher of Penthouse Magazine. The complaint alleged that Hustler and Flynt had waged an unrelating campaign of malicious libel against the plaintiffs which culminated in a cartoon published in the May 1976 issue of Hustler Magazine that, *inter alia*, accused Guccione of infecting Keeton with a venereal disease (8a).

In May 1978, Keeton's cause of action for libel was dismissed as barred by the Ohio statute of limitations.

Keeton did not appeal because she believed that substantially the same damages could be recovered in her suit for invasion of privacy. However, literally on the eve of trial, on February 19, 1980, the Ohio trial court dismissed Keeton's invasion of privacy claim on the theory that the New York statute of limitations was migratory and barred her claim. That order was entered on February 28, 1980 and Keeton filed a Notice of Appeal on March 20, 1980. On September 30, 1980, the Franklin County Court of Appeals affirmed the dismissal of Keeton's privacy claim, based upon the application of the New York statute of limitations (54a-70a).

Keeton promptly commenced this action in the United States District Court for the District of New Hampshire on October 21, 1980.* The jurisdiction of the New Hampshire district court was invoked under 28 U.S.C. §1332—the plaintiff is a resident of New York, the individual defendant a resident of California and the remaining defendants are Ohio corporations.

In an opinion issued on June 18, 1981 (Pet. 2a-8a), the district court granted defendants' motion to dismiss on the ground of lack of personal jurisdiction. The district court found that while defendants' activities in New Hampshire may have been sufficient to satisfy that state's long-arm statute—particularly since such contacts with New Hampshire "were not random, isolated or transitory" but were "purposefully directed at New Hampshire" (Pet. 5a)—plaintiff's minimal contacts with the forum and the absence of a state interest in protecting nonresidents from

* This action asserts libel resulting from the scurrilous cartoon published in the May 1976 issue of Hustler Magazine, as well as publication of nude photographs of a 50 year-old "centerfold" in the September 1975 issue of Hustler, falsely identified as Kathy Keeton, and several subsequent issues of the magazine reprinting or referring to those same photographs (3a-33a).

defamation made it unfair as a matter of due process to permit New Hampshire to assert jurisdiction over the defendants.

The First Circuit Court of Appeals affirmed on June 16, 1982 (Pet. 11a-20a), similarly holding that the due process clause of the federal constitution prohibited the exercise of personal jurisdiction, even though the New Hampshire long-arm statute was satisfied and even though a resident of New Hampshire could have maintained such a suit.

Thus, the courts below have forced New Hampshire to discriminate against nonresidents in favor of residents, and to deny nonresidents access to its courts while granting residents access under identical circumstances. In short, the First Circuit has created two classes of United States citizens, one of which is to be favored over the other merely because of the happenstance of geography. Those who live within the forum state are first class citizens entitled to invoke the aid of the court—those who do not live within the forum state are second class citizens and are not entitled to invoke the aid of the court.

Summary of Argument

The courts below ruled as a matter of constitutional law that due process forbids the State of New Hampshire from exercising personal jurisdiction over the defendants in this defamation action, even though they have regularly marketed their magazines in that jurisdiction for many years, have launched their product into the stream of commerce with the expectation that the magazines will be purchased by New Hampshire readers, and have committed a tort in New Hampshire causing plaintiff to suffer at least some damage within that jurisdiction.

The First Circuit erroneously ruled that the factor of plaintiffs non-residence overcomes defendants' continuous contacts with the State to make it unfair as a matter of due process to require the defendants to respond to a lawsuit in New Hampshire. This approach improperly shifts the focus of the jurisdictional inquiry from the relationship among the defendants, the forum and the litigation to an impermissible emphasis on the fortuitous circumstance of plaintiff's residence. Such analysis is not only inconsistent with the prior rulings of this Court but, without adequate guidelines, adds another layer of confusion onto the "minimum contacts" balancing test, so as to make it impossible to determine in advance when due process will be satisfied.

I

The Court of Appeals improperly focused on plaintiff's lack of contact with the forum rather than on defendants' substantial contacts.

It is a distortion of the "fairness" test to close the doors of the New Hampshire courts once defendants' minimum contacts with that jurisdiction have been established. Such a holding impacts upon every case brought by a nonresident, and suggests a new, impermissible emphasis upon plaintiff's contacts with the forum—an approach inconsistent with the teaching of this Court.

The seminal case of *International Shoe Co.* v. *State of Washington,* 326 U.S. 310, 316 (1945), focused the due process analysis upon the *defendant's* contacts with the forum:

> "... due process requires *only* that in order to subject a defendant to a judgment in personam, if he be

> not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (Emphasis added) (Citations omitted).

The "minimum contacts" analysis of *International Shoe* considers the activities of the defendant within the forum in order to balance the exercise of jurisdiction against "[a]n estimate of the inconveniences which would result to the corporation from a trial away from its 'home' or principal place of business . . ." *Id.* at 317. The "minimum contacts" referred to in *International Shoe* are the contacts of the defendant, and not those of the plaintiff, who has elected to litigate in the forum. Thus, whether the lawsuit is commenced by a resident or a non-resident, defendants' "minimum contacts" with the forum are precisely the same in both circumstances. In *Shaffer* v. *Heitner,* 433 U.S. 186, 204 (1977), this Court pointed to "the relationship among the defendant, the forum, and the litigation" as "the central concern of the inquiry into personal jurisdiction." Later, in *World-Wide Volskwagen Corp.* v. *Woodson,* 444 U.S. 286, 292 (1980), the Court similarly emphasized "[t]he relationship between the defendant and the forum" as the test of reasonableness and identified other relevant factors, none of which included plaintiff's contacts with the forum. This Court has never included plaintiff's relationship with the forum as an element of the due process analysis. Such an omission was not accidental, as recently confirmed by this Court in *Rush* v. *Savchuk,* 444 U.S. 320 (1980).

Rush declared unconstitutional the line of cases typified by *Seider* v. *Roth,* 16 N.Y.2d 111 (1966), which permitted a resident to obtain *quasi in rem* jurisdiction over a non-resident by attaching the insurance company's obligation to

defend arising from the defendant's insurance policy. Criticizing the *Seider* variety of cases, this Court observed that "they shift the focus of inquiry from the relationship among the defendant, the forum and the litigation to that among the plaintiff, the forum, the insurer, and the litigation." *Id.* at 332. The Court concluded that this shift was neither intended nor permitted by the holding in *International Shoe*:

> "This subtle shift in focus from the defendant to the plaintiff is most evident in the decisions limiting Seider jurisdiction to actions by forum residents on the ground that permitting nonresidents to avail themselves of the procedure would be unconstitutional. *In other words, the plaintiff's contacts with the forum are decisive in determining whether the defendant's due process rights are violated.*
>
> *Such an approach is forbidden by International Shoe and its progeny.*" *Id.* (Emphasis added).

Abandoning all semblance of subtlety, the court below simply seized upon plaintiff's lack of contact with New Hampshire as the decisive factor in dismissing the lawsuit.

In addition, the Court of Appeals sought to justify its conclusion by observing that "New Hampshire has no special interest in protecting a nonresident against this out-of-state activity" (Pet. 18a). But there can be no doubt that a tort was committed in New Hamphire by the distribution there of the defamatory publications. The Supreme Court of New Hampshire expressly recognized the important state interest arising in such circumstances:

> "A state has an especial interest in exercising judicial jurisdiction over those who commit torts within

> its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort." *Leeper* v. *Leeper*, 114 N.H. 294, 298 (1974), quoting from Restatement 2d, Conflict of Laws Sec. 36, Comment e (1971).

The "especial interest" identified by the New Hampshire Supreme Court in *Leeper* is no less present in a defamation case. As the court in *Leeper* stressed, it is "wrongful conduct" which the State of New Hampshire seeks to deter —the state's "especial interest" in deterrence is not diminished by the limited extent of local damage caused by such wrongful conduct. The pivotal factor is *conduct*—whether the plaintiff has been damaged extensively or minimally in New Hampshire should not erode New Hampshire's resolve to deter tortious conduct wherever it may be found within state borders.

Were defendants citizens of New Hampshire, they could certainly be sued here. If defendants' home state is thus viewed as having an interest in policing the conduct of its residents, then surely there is an even greater interest in monitoring the affairs of those nonresidents who intrude themselves into the commerce of the forum and exploit its citizens for profit and commercial gain.

In extending the reach of its long-arm statute to the constitutional limit, New Hampshire reaffirmed its interest in exercising jurisdiction over tortious conduct, even in favor of lawsuits brought by nonresidents. Thus, in 1971, New Hampshire deleted from its long-arm statute (Pet. 20a) the requirement that a tort be committed "against a

resident of New Hampshire."* If the State of New Hampsire was concerned only with protecting its citizens or only with damages suffered within its borders, then its Legislature in 1971 would not have dropped the requirement that a tort be committed "against a resident of New Hampshire" in order to satisfy the long-arm statute, and its Supreme Court in 1974 would not in *Leeper* v. *Leeper* have focused solely on the issue of conduct when it defined New Hampsire's "especial interest" in deterring torts.

Furthermore, New Hampshire has an abiding interest in deterring criminal conduct. Defendants' activities in New Hampshire violate that state's criminal defamation statute, which makes it a misdemeanor if a person "purposely communicates to any person, orally or in writing, any information which he knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule." R.S.A. 644:11(A).

The court below indicated that the only obstacle blocking jurisdiction was its decision in *Seymour* v. *Parke, Davis & Co.*, 294 F. Supp. 1257 (D.N.H. 1969), *aff'd*, 423 F.2d 594 (1st Cir. 1970). This case presents facts far different from those which the court held insufficient to support jurisdiction in *Seymour;* moreover, this case falls within each of the two independent exceptions identified in *Seymour* as circumstances in which jurisdiction could be constitutionally exercised.

Seymour was an action for personal injury and wrongful death caused by a drug manufactured by the defendant pharmaceutical company. The contaminated drug was

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* Other states have not gone quite as far, and still maintain "door-closing" statutes (see 66 Colum. L. Rev. 377 (1966)) or residency requirements (see, e.g., Conn. Gen. Stat. Rev. §37-519(c) (1961); Minn. Stat. Ann. §303.13(3) (Supp. 1965)).

prescribed by a Massachusetts physician, purchased in a Massachusetts drug store and ingested by plaintiff's decedent in Massachusetts, where he lived at all times until his death.

In *Seymour,* the tort occurred in Massachusetts, whereas here the tort occurred in New Hampshire because the libel was published there. In *Seymour,* the only complaint about defendant's drug was with respect to the single dosage taken by plaintiff's decedent in Massachusetts. Here, the actual product complained of was in fact circulated in New Hampshire—some 50-75,000 copies of Hustler Magazine "contaminated" with the offensive libel were distributed throughout the state.

The district court in *Seymour* acknowledged that the case was one of "first impression", 294 F. Supp. at 1260, so that the ruling would be "limited to the facts of the instant case," *id.* at 1263. Central to the district court's decision was its conclusion that New Hampshire "has *absolutely no interest whatsoever* in the litigation". *Id.* (Emphasis added). However, in view of the subsequent decision of the New Hampshire Supreme Court in *Leeper* and the New Hampshire criminal defamation statute (not applicable in *Seymour*), New Hampshire has clearly identified its "especial interest" in deterring tortious and criminal conduct within its borders.

The *Seymour* case actually supports the exercise of jurisdiction here because of the due process guidelines enumerated by the First Circuit.

> "If the plaintiff has some attachment to the forum, or if the defendant has adopted the state as one of its major places of business, we would have no question of the right of the state to subject the defendant to suit for *unconnected causes of action. Nor would we even if the forum were not a major*

> *center of defendants' business but were nevertheless a comuunity into whose business life defendant has significantly entered as determined by the quality, substantiality, continuing and systematic nature of it activities.* When, however, defendant's only activities consist of advertising and employing salesmen to solicit orders, we think that fairness will not permit a state to assume jurisdiction." 423 F.2d at 586 (Emphasis added) (Citations omitted).

First, in this case the cause of action is *connected* to the forum because the libel occurred in New Hampshire. That alone under *Seymour* should satisfy the due process requirement of fairness. In *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 447 (1952), where *all* parties were nonresidents, this Court found that defendant's business activities were sufficient to permit an Ohio court to assert jurisdiction, even "where the cause of action arose from activities entirely distinct from its activities in Ohio."

Second, New Hampshire is certainly "a community into whose business life the defendant had significantly entered as determined by the quality, substantiality, continuity and systematic nature of its activities." To meet this test under *Seymour,* it is not required that New Hampshire be " a major center of defendants' business," but only a community into which the defendant has entered on a regular and substantial basis, as already found by the district court below (Pet. 5a). Defendants' interrogatory answers reveal that during the five months between November 1977 and March 1978, defendants distributed 94,050 copies of Hustler Magazine in New Hampshire, earning gross revenues of $235,125 ($2.50 per copy)

(81a-86a). Using that period as a typical five-month circulation figure, defendants since 1975 have distributed over 1,692,900 Hustler Magazines in New Hampshire, earning over $4,232,250 in gross revenues to date (on the basis of $2.50 per issue, although the cover price has since increased). This persistent exploitation of the New Hampshire market place surely qualifies as the kind of "significant" involvement contemplated by Seymour and demonstrates far greater activity than mere "advertising and employing salesmen to solicit orders," which was the only contact present in *Seymour*.

In a case jurisdictionally indistinguishable from this action, the New Hampshire district court exercised jurisdiction. *Galonis* v. *National Broadcasting Co.*, 498 F. Supp. 798 (D.N.H. 1980), was a defamation action brought in New Hampshire by a Pennsyvania citizen and Pennsylvania corporations against Delaware corporations with principal offices in New York. The court rejected defendants' argument that "venue in New Hampshire is improper because the damages (if any) incurred by the plaintiffs were national and not confined to New Hampshire . . ." *Id.* at 791. Thus, although the defendants in *Galonis* raised the issue of reputation damages caused by a nationwide defamation, the court entertained the lawsuit even though the primary situs of injury was arguably in Pennsylvania (plaintiff's state of residence) and the damages suffered in New Hampshire were no greater than that incurred in other jurisdictions. Significantly, the federal court exercised jurisdiction in *Galonis*, although New Hampshire has no more of an interest in that defamation case brought by a nonresident than it has in this litigation.*

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* This Court too has upheld jurisdiction in a case brought by a nonresident agianst a nonresident. *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952).

The risk of being sued in a foreign jurisdiction is not unexpected for a publisher who exploits a nationwide market. See *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286, 297 (1980); *McGee* v. *International Life Insurance Co.,* 355 U.S. 220, 223 (1957). The Fifth Circuit in *Curtis Publishing Co.* v. *Golino,* 383 F.2d 586, 590 (5th Cir. 1967), drew a sharp distinction between publications seeking a national audience and those geared primarily for local consumption. The Fifth Circuit warned that a careful publisher could eliminate all contacts, other than circulation, with most jurisdictions and thereby enjoy an immunity from suit in those forums "in spite of the pecuniary benefits gained in that very jurisdiction where it asserts it cannot be held legally accountable." *Id.* at 591.

> "Clearly it would not comport with notions of fair play and substantial justice to allow a business enterprise, whose overriding business purpose is maximum exploitation of the national market to be free from suit as a matter of law in all states but that of publication simply because physical contacts with the other states had been reduced to a minimum." *Id.*

If the risk of litigation is too great, the publisher can sever its connection with the jurisdiction or simply alleviate the risk by procuring insurance or otherwise passing along the expected costs to its customers. *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286, 297 (1980).

Even the New Hampshire district court has cautioned against erecting an "unreasonable barrier to lawsuits against foreign corporations, based not on the practicalities of the situation, but on legal formulas and fictions that bear no relationship to the facts of life in the 1970's."

Gill v. *Fairchild Hiller Corp.*, 312 F. Supp. 916, 918 (D.N.H. 1970). The New Hampshire district court recognized the price a publication must pay for the benefits of national circulation:

> "The risk of suit being brought against them in any one of the fifty states is one of the risks that defendants must bear because of the nature of their business." *Id.*

Nor does this subject defendants like Hustler to unpredictable and inconsistent results, for choice of law principles will uniformly select the appropriate substantive law to be applied, regardless of the situs of the litigation.

Accordingly, refusing to permit New Hampshire courts to exercise jurisdiction over the defendants in this case constitutes the very "subtle shift in focus" which is "forbidden by *International Shoe* and its progeny", *Rush* v. *Savchuk, supra,* at 332, and ignores the special risks and responsibilities imposed on the media as the price of doing business in an era where state lines have been obliterated by modern technology.

II

The confusing test formulated by the Court of Appeals unravels settled principles of due process analysis.

The opinions by the courts below have far-reaching consequences for every litigant who seeks to bring an action in a jurisdiction other than his home state. The opinions below have particular adverse consequences for libel plaintiffs in terms of limiting the available jurisdictions in which they can sue, with the possible hardship of compelling them to travel to the jurisdiction of the wrongdoer as the only available forum.

The decision of the First Circuit affirming the dismissal of this action is based solely on due process grounds—"that the federal constitution . . . would not permit New Hampshire to exercise jurisdiction over defendants in this instance" (Pet. 13a).* The First Circuit believed it would be constitutionally "unfair" to permit this lawsuit because of the special problems involved in a libel case (Pet. 18a). While "the plaintiff must recover the damages caused in all states in one single suit" (Pet. 17a), here, the court reasoned, "[n]early all the damages the plaintiff seeks arise from injury to her reputation outside of New Hampshire" (18a).**

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* There is no question that the New Hampshire long-arm statutes seek to extend jurisdiction over nonresidents to the fullest extent permitted by the federal constitution (Pet. 13a).

** The court ignored the fact that damages in a libel action are not limited to injury to reputation, but may also include "personal humiliation, and mental anguish and suffering" *Gertz* v. *Welch*, 418 U.S. 323, 350 (1974). See also *Time, Inc.* v. *Firestone*, 424 U.S. 448, 460-61 (1976).

The court thus recognized that plaintiff "is suing in part for damages suffered in New Hampshire" (Pet. 15a), but that it would be unfair to hold defendants responsible in a New Hampshire action for damages suffered outside of that state—"the New Hampshire tail is too small to wag so large an out-of-state dog" (Pet. 19a).* Keeton may not split her cause of action among several jurisdictions, and the policy behind the single publication rule requires a single lawsuit for multistate defamation; accordingly, the First Circuit affirmed the dismissal of the action in its entirety rather than permitting the case to proceed at least on the basis of damages suffered in New Hampshire.

The bizarre nature of this ruling becomes most apparent in the court's analysis of "fairness" under *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and its progeny. It is undisputed that an average of 10-15,000 copies of Hustler Magazine are distributed each month within New Hampshire (81a-86a). This commercial activity has been taking place on a regular basis since the inception of the publication in 1975.** As the district court found, these contacts "were not random, isolated or transitory" but

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* But this Court has suggested that a nonresident like Keeton can sue for injury suffered in any forum where a defendant "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state." *World-Wide Volkswagen* v. *Woodson*, 444 U.S. 286, 298 (1980).

** Keeton complains about five separate issues of Hustler Magazine: September 1975, October 1975, The Best of Hustler No. 2 (published in late 1975), May 1976 and July 1976, so that between 50-75,000 copies distributed in New Hampshire are the subject of this lawsuit.

"purposefully directed at New Hampshire . . ." (Pet. 5a).* The defendants have therefore engaged in those acts by which they "purposefully avail [themselves] of the privilege of conducting activities with the forum state, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958).

Defendants' conduct in New Hampshire is no less purposeful because plaintiff was simultaneously harmed in other jurisdictions as well, nor does the extent of the harm caused Keeton in New Hampshire render the defendants' conduct any less tortious or any less purposeful. Certainly due process cannot prohibit New Hampshire from redressing such conduct at the behest of a nonresident and at the same time permit New Hampshire to redress such conduct at the behest of a resident.

Once these minimum contacts are factually established, the jurisdictional inquiry should have come to an end, and due process does not require further inquiry into plaintiff's relationship with the forum. *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 443 (1952); *Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980). Yet the court below seized upon the dubious proposition that the reputation damages suffered by a non-resident can be apportioned from state to state, and concluded that it would be "unfair" to permit suit in a forum of minimal damage.

This Court has never embraced such an approach. While the place of injury may be an important factor in determining choice of law, it is no part of the personal juris-

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* This case is therefore distinguishable from the "fortuitous circumstance" and "isolated occurrence" of a single automobile sold in one state that happens to have an accident while passing through the forum state. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 295, 297 (1980).

diction equation under *International Shoe*. The First Circuit's pivotal distinction between damages suffered by Keeton in New Hampshire and damages suffered by her outside of that jurisdiction (Pet. 18a-19a) in conjunction with the "minimal" contacts of the defendants (Pet. 15a), improperly focuses upon the quantity of contacts and the amount of plaintiff's injury, contrary to analyzing the nature and quality of the contacts between the nonresident and the forum:

> "The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more a little less." *International Shoe Co.* v. *Washington, supra,* 326 U.S. at 319.

It is the purposeful nature of defendants' New Hampshire activities (Pet. 5a) which subjects them to jurisdiction there. While a publisher may claim that its forum circulation is confined to only 1% of its national market, that is no reason to restrict exposure to the quantity of business conducted in the forum. See, e.g., *Curtis Publishing Co.* v. *Golino,* 383 F.2d 586 (5th Cir. 1967).

The effect of this unusual holding is to either force a libel plaintiff to seek out the wrongdoer in his own jurisdiction or to limit the plaintiff to the forum of primary injury which, according to the courts below, is plaintiff's home state.* But this result totally ignores the purposeful acts of the defendants in causing plaintiff injury in New Hampshire. A consistent application of the rule created by the courts below would even render it "unfair" for plaintiff to sue in her home state and

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* Because Keeton is a New York resident, and New York's long-arm statute excepts a cause of action for defamation, Keeton would have no such choice. CPLR §302(a)(2)(3) (Pet. 22a).

seek to recover damages for the harm suffered in other jurisdictions, for there too the local "tail is too small to wag so large an out-of-state dog."

In support of its conclusion that it would be "unfair" to allow this action, the Court of Appeals cited the policies of penalizing "a plaintiff who sleeps on her rights" and the need to avoid subjecting a publisher to "the risk of suit covering all damage suffered everywhere as long as there is any state anywhere with a statute of limitations that has not expired" (Pet. 18a). These considerations have no application to Keeton, who vigorously pursued her rights both in Ohio and New Hampshire. Moreover, the policy which seeks to protect a publisher against the risk of interminable litigation simply does not apply where the publisher has been put on notice of plaintiff's grievance and is aware that plaintiff is actively pursuing her rights.

CONCLUSION

This case presents an egregious example of a federal court's impermissible application of the due process clause to infringe upon a state's exercise of jurisdiction. Although the State of New Hampshire has enacted a long-arm statute which embraces jurisdiction over the defendants in this action, and even the federal courts would have permitted New Hampshire to exercise jurisdiction if the plaintiff was a resident, the court below incongruously held that allowing jurisdiction here would somehow be "unfair" to the defendants merely because of the fortuitous circumstance of plaintiff's nonresidence.

The application of the principles outlined by this Court in *International Shoe* and its progeny yields predictable jurisdictional results once the "minimum contacts" test has

been met. However, according to the court below, where the plaintiff is a nonresident, satisfying the "minimum contacts" test does not end the jurisdictional inquiry, but begins a new inquiry that involves an impractical weighing of whether defendants' contacts are sufficient to overcome the factor of plaintiff's nonresidence. This novel and unworkable doctrine, invoked only where plaintiff is a nonresident of the forum, destroys the threshold standard of "minimum contacts" which at least guaranteed consistent results under *International Shoe*, and substitutes in its place another layer of unnecessary analysis which will lead to chaos in the jurisdictional inquiry.

The confusing consequences of this decision require that the judgment of the First Circuit Court of Appeals should be reversed and the action reinstated.

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Dated: April 8, 1983

Supreme Court, U.S.
FILED
JUN 24 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-485

IN THE

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1) Does the Due Process Clause permit New Hampshire to assert jurisdiction over a suit brought by a New York plaintiff against an Ohio publisher arising out of the defendant's publishing activities in Ohio simply because a small quantity of the defendant's magazines were sent into New Hampshire by an independent distributor and because the plaintiff hypothesizes some remote and speculative harm that might have occurred within New Hampshire?

2) Do the First Amendment and the Commerce Clause allow New Hampshire to penalize a magazine publisher for the fact that some of its magazines were sent into the state by an independent distributor by compelling it to defend litigation concededly centered around injury not suffered in New Hampshire and barred by the statute of limitations of every other state?

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 11a-20a) is reported at 682 F.2d 33. The opinion of the District Court (Pet. 2a-8a) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on June 16, 1982. The petition for a writ of certiorari was filed on September 14, 1982, and was granted on January 24, 1983. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment and Section 1 of the Fourteenth Amendment (Pet. 21a) and a portion of the New York long-arm statute (Pet. 22a) are set out in the appendix to the petition for certiorari.

Constitution of the United States

Article I, Section 8

The Congress shall have power . . . to regulate commerce . . . among the several states.

New York CPLR § 301
Jurisdiction over persons, property, or status.

A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.

STATEMENT OF THE CASE

The present action was commenced in federal district court in New Hampshire in October, 1980, over four years after the cause of action accrued, after having already been dismissed once by an Ohio court on statute of limitations grounds. The subject matter of the suit concerned a cartoon and a pictorial centerfold published by Hustler magazine. The plaintiff, Kathy Keeton, is also a publisher of "sophisticated gentlemen's literature" and is the common law wife of Bob Guccione, publisher of Penthouse magazine. New Hampshire was chosen as a forum because it was the only state where the statute of limitations remained open.

The plaintiff has at all relevant times resided and worked in New York. (53a) Hustler magazine is an Ohio corporation, since moved to California. (41a) Hustler's parent corporation, L.F.P., Inc., an Ohio corporation with no editorial control over the contents of Hustler, presently has its principal place of business in California. (36a) Larry Flynt, the publisher of Hustler, has resided and worked in Ohio and California. (39a) The decision to print and the printing of the complained-of material occurred in New York and Ohio. (41a, 45a)

The defendants neither own nor rent property in New Hampshire, and neither solicited nor received advertising revenues from within the state. They are listed in no telephone directory there, employ no salesmen there, are not licensed to do business there, and maintain no bank accounts there. (37a, 40a, 42a, 44a) Hustler magazine's sole contact with New Hampshire was that some unascertained number of Hustler magazines, known to be less than one per cent of its total circulation, was sent into the state by independent distributors.[1] The plaintiff's

[1] The gross revenues of the issues in question constituted less than 1% of Hustler's sales in the United States. (43a) The comparative ranking with other magazines circulated in the state is not known.
(footnote continued on following page)

sole contact was harm to a hypothesized local reputation, said to exist by virtue of the fact that plaintiff's name appeared in fine print on the masthead page of three magazines that enjoyed some local circulation, along with the names of all other publishers and officers. (50a, 51a)

The district court found that the plaintiff's allegation of contact was "strained at best", noted that she had the burden of pleading and proving such facts, and concluded that she had shown "absolutely no connection with the state of New Hampshire." (Pet. 7a). Having thus rejected these implausible and unsupported allegations of harm as too "tenuous and generalized", (Pet. 7a) the court concluded that New Hampshire had no interest in the case because the relationship between the state, the parties, and the events was too attenuated.

The Court of Appeals agreed that due process prevented assertion of jurisdiction where the litigation was centered around damage to the plaintiff's reputation elsewhere. (Pet. 18a) It held that Hustler lacked sufficiently systematic contacts to support general jurisdiction over causes of action not related to any New Hampshire activity. While recognizing that in some situations an out-of-state plaintiff might have a local reputation sufficient to support jurisdiction, it found New Hampshire to have insufficient interest on these facts to tip the due process balance. (Pet. 19a)

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(76a). Furthermore, it is not known how many magazines were sold in New Hampshire; the only figures reflect sales to wholesalers who distribute *some portion of their magazines* in New Hampshire. (74a). The number sold in the state is obviously smaller. During the time period in question, Hustler magazine did not distribute to New Hampshire wholesalers directly, but through an independent distributor in Derby, Connecticut. (78a).

SUMMARY OF ARGUMENT

The Due Process minimum contacts standard for assertion of personal jurisdiction requires that the burden to the defendant be outweighed by the state's interest in litigating the dispute, the interstate judicial system's interest in efficient dispute resolution, and the plaintiff's interest in obtaining convenient relief. For the plaintiff to choose a state simply because the statute of limitations has run elsewhere frustrates convenient and efficient dispute resolution and affronts the sovereignty of other members of the interstate judicial system.

In addition, the burden on the defendant is unusually high because activities engaged in elsewhere and the alleged injuries suffered elsewhere must be litigated in an inconvenient location and be subjected to local rules such as statutes of limitations. The countervailing interest of the forum is likewise reduced where the hypothesized injury within the state is so remote and speculative, and of such vanishing importance to the litigation, that it constitutes only a pretext for bringing the defendant within the jurisdiction of the state. Since the interest in convenient and effective dispute resolution is non-existent, the state's interest is fictitious, and the burden on the defendant is unusually large, the courts below were correct in dismissing this suit on due process grounds.

The First Amendment likewise requires that a state have a legitimate interest sufficient to outweigh the burden to the defendant. The state of New Hampshire has no legitimate interest in a non-resident publisher's communications about a non-resident plaintiff to non-resident readers. Such is the very great bulk, indeed the entirety, of this lawsuit.

Even if there were a minimal local reputation, compelling the defendant to litigate the entire controversy in an inconvenient forum is an overly broad remedial measure. The right to circulate literature would be chilled if, by selling to independent distributors that resold some portion of those magazines in New Hampshire, publishers would be subjecting themselves to

New Hampshire personal jurisdiction and to application of New Hampshire law to all activities engaged in and all injuries suffered in any state of the union.

Imposing such subjection to forum shopping as the price of minimal sales of magazines within the state violates the Commerce Clause as well as the First Amendment. A state may not burden defendant's engaging in interstate commerce by compelling it to respond to allegations of injury not related to New Hampshire in any way. Suits concerning out-of-state conduct affecting out-of-state plaintiffs cannot be predicated upon miniscule sales of the defendant's products within the state.

Finally, jurisdiction over the parent corporation L.F.P., Inc. and over Flynt, an employee holding the corporate title "publisher," is even less defensible than jurisdiction over Hustler. The plaintiff has failed even to allege L.F.P.'s specific participation in the publishing of the material at issue, and the mere parent/subsidiary relationship is insufficient basis for jurisdiction. Given the uncontroverted affidavits (36a) establishing its status as a mere holding company, L.F.P. has no constitutionally cognizable contacts, not even minimal local sales. As an employee of defendant Hustler, who likewise has not been shown to have contacts with New Hampshire, Flynt is not subject to jurisdiction in his personal capacity.

I.

Except where suit is brought in the defendant's home state, Due Process requires the plaintiff in a multi-state defamation action to demonstrate a substantial local reputation that constitutes a significant focus of the litigation.

This Court has recently re-emphasized the need for a sufficient nexus between the contacts upon which personal jurisdiction is predicated and the operative facts of the dispute sought to be adjudicated.[2] *Shaffer v. Heitner*, 433 U.S. 186 (1977) (jurisdiction cannot be based on mere presence of property not related to the dispute). In *Shaffer*, 433 U.S. at 212, this Court declared that all assertions of jurisdiction must meet the "minimum contacts" test set out in *International Shoe v. Washington*, 326 U.S. 310 (1945). The minimum contacts analysis of *International Shoe* is one of reasonableness and of "fair play and substantial justice". *Id.* at 316. The dual function of these limitations is protection of individual defendants and of values of interstate federalism. *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980). Concepts of this sort are not susceptible to quantification or mechanical application, and this Court has rejected two simplistic approaches.

First, it has explicitly denied that the mere fact that one of the defendant's products finds its way into the forum is itself sufficient to support jurisdiction, even where it is undisputed that the tortious injury was suffered entirely in the forum. *World Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980). Under this approach, "[e]very seller of chattels would in effect ap-

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[2] In certain limited circumstances, a defendant may be amenable to "general jurisdiction" even over litigation having no nexus with its local activities because the state is its domicile, place of incorporation, or principal place of business. *See, e.g., Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952); *Milliken v. Meyer*, 311 U.S. 457 (1940); *See also* Von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1136 (1966).

point the chattel his agent for service of process," a consequence this Court found unacceptable. *Id.* at 296.

Second, the Court has refused to allow assertion of jurisdiction based upon self-serving allegations about presence of intangibles, such as the hypothetical reputational interest asserted to be present in New Hampshire in the present case. *Rush v. Savchuk*, 444 U.S. 320 (1980); *Shaffer v. Heitner*, 433 U.S. 186 (1977) (presence of stock). This scepticism is appropriate, for such allegations are easy to manufacture and hard to refute. In *Rush*, the Court rejected jurisdiction based upon the "presence" of the insurance company's "obligation to defend" in automobile accident litigation because that contact, if "present," would also be "present" in the other forty nine states. "It is apparent," concluded the Court, "that such a 'contact' can have no jurisdictional significance." 444 U.S. at 330.

The same can be said of the New Hampshire injury alleged here. In fact, Keeton's persistent claims that "the tort occurred in New Hampshire" (Pet. Brief 4, 7, 10, 11) show precisely how manipulable the location of intangible injury can be if the plaintiff need offer no plausible factual support. If the tort occurred in New Hampshire, it occurred in forty nine other states to at least as great a degree.[3] Such fictions serve only one function: they are pretexts introduced solely in an attempt to create constitutionally sufficient contacts. As the *Shaffer* Court noted in explaining why the presence of unrelated property was an inadequate basis for jurisdiction, "the only role played by the property is to provide the basis for bringing the defendant into court." 433 U.S. at 209. The trial court rejected Keeton's argument as a matter of fact, and this Court should not allow its reintroduction as a fiction.

Rejecting these two simplistic approaches, this Court has instead adopted a more sophisticated assessment of competing

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[3] For the same reason, New Hampshire may not establish local injury to circumvent jurisdictional limitations by "presuming damages" in New Hampshire.

factors. Keeton argues that the only relevant consideration is the defendant's contact with the forum. (Pet. Brief 5) But *World Wide Volkswagen* listed additional factors to be used in assessing the significance of these contacts:

> the burden on the defendant, while always a primary concern, will in appropriate cases be considered in light of . . . the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interests of the several States in furthering fundamental substantive social policies.

444 U.S. at 292 [citations omitted]. Not a single one of these factors points towards New Hampshire adjudication of this case. The burden on the defendant is unusually large; the legitimate interests of the forum and the plaintiff unusually slight; and the interests of other states and of the interstate judicial system compellingly in favor of dismissal.

A. The burden on the defendant would be unusually large because New Hampshire is an inconvenient forum and the plaintiff seeks application of New Hampshire law to injury concededly not suffered in New Hampshire.

Even if the damage to New Hampshire reputation that petitioner alleges in order to obtain jurisdiction were plausible, it would constitute only a minute fraction of the dispute. In any realistic sense, Keeton's reputation is in New York where she resides and works. Her "personal humiliation, and mental anguish and suffering," *Gertz v. Welch*, 418 U.S. 323, 350 (1974), are indisputably not located in New Hampshire; if included they diminish the percentage of harm in New Hampshire even further. Keeton alleges damages in excess of forty million dollars; surely even she does not contend that any sizable portion of that figure is attributable to New Hampshire, where her "reputation" consists of having her name in the fine print of several

magazines, along with all the other officers on the masthead. And even if her reputation were evenly distributed across the country, instead of being centered in New York, over ninety nine percent of Hustler's circulation occurred in other states. (43a) The defendants' burden of producing witnesses and introducing evidence refuting allegations of harm is therefore far greater here than in cases such as *World Wide Volkswagen*, in which all of the harm concededly occurred in the forum and the physical evidence concerning the collision was located there. All witnesses in the present case are in New York, California, or Ohio. (45a) One of the defendants, furthermore, is confined to a wheelchair in Los Angeles. (45a)

Related to the extreme inconvenience of New Hampshire as a place to try the case is the extreme unfairness of adjudicating the case under New Hampshire procedural law. Petitioner seeks a New Hampshire forum precisely because she expects application of the New Hampshire statute of limitations as a procedural or remedial matter. Since the law of the forum governs on matters of procedure, *Restatement (Second) of Conflict of Laws*, §150 (1971), local procedural law is a burden that automatically follows the assertion of jurisdiction. Where there is a nexus between the litigation and the forum this is arguably not unfair. Plaintiff's goal in bringing this lawsuit in New Hampshire, however, is not to prove and recover New Hampshire damages. The trial judge has already found as a matter of fact that no New Hampshire reputation exists. Her goal is, rather, application of the New Hampshire statute of limitations to injury suffered in states where the statute of limitations has run. This extreme burden of defending injury totally unrelated to New Hampshire under New Hampshire procedures of adjudication is sufficient reason in and of itself to find this suit barred by the Due Process Clause.

New Hampshire procedural law is a burden that must be considered at this stage because the forum automatically applies its own rules of adjudication; but application of New Hampshire substantive law is an additional burden to be considered. The anticipated application of unfair substantive law is a legiti-

mate concern in assessing the burden to the defendant. *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 311 n.19 (1980) (Brennan, J., dissenting). The plaintiff claims that "choice of law principles will uniformly select the appropriate substantive law to be applied, regardless of the situs of the litigation." Pet. Brief at 14. This flies in the face of the request, in her complaint, that New Hampshire damages law be applied. (6a, 13a) Moreover, New Hampshire follows the "better law" approach to choice of law, *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966), Kay, *Theory into Practice: Choice of Law in the Courts*, 34 Mercer Law Review 521, 564 (1983). This Court has explicitly declined to adopt the "better law approach" as a sufficient basis for jurisdiction, *Allstate Insurance v. Hague*, 449 U.S. 302 (1981) (plurality opinion). Indeed, one member of this Court has characterized one of the method's applications as "plainly unsound as a matter of normal conflicts law." *Id.* at 323 (Stevens, J., concurring). State rules in defamation cases vary considerably, and it cannot be assumed that application of the "better law" approach will lead to a fair result, or indeed to any result other than local law.[4] New Hampshire would have a better claim to apply its law to any portion of the injury realistically suffered in New Hampshire. Yet the burden that the plaintiff seeks to impose is application of New Hampshire law to damage claims from other states. Due process prohibits this result because the burden is excessive and because New Hampshire has no conceivable interest in the damage that constitutes the focus of the dispute.

B. New Hampshire has no interest in this litigation.

Due process requires assessment of the forum state's interest in the litigation. *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980). The district court rejected the claims of New Hampshire injury as a factual matter after allowing adequate

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[4] For example, application of local law led one state court to rule, in an "all purpose" public figure case, that the "actual malice" and "no liability without fault" standards do not require that the pub-

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opportunity for discovery, and held that the forum had no interest in the dispute. "Being listed in this litany of unknowns [on the masthead of magazines distributed in New Hampshire] does not make her name a household word here, *nor does it create a reputation or image of any kind in New Hampshire.*" (Pet. 7a (emphasis added)). It hardly seems likely that the plaintiff will adduce new evidence of New Hampshire injury at trial, nor does it seem likely that she will even attempt to, once the jurisdictional threshold is passed. Moreover, she has had ample opportunity already to allege a plausible set of facts to support her bald assertions of New Hampshire injury, and has failed through discovery or amending her pleadings to do so. It is not for an appellate court to disturb the trial judge's findings, absent some clear showing of abuse.

Even if the district court had not explicitly found as a matter of fact that there was no New Hampshire injury, unsupported and conclusory allegations of local harm should not suffice for jurisdiction. Contacts with the forum must be bona fide and not manufactured solely for the purpose of creating jurisdiction. In *Allstate v. Hague*, 449 U.S. 302 (1981) analogously, the plaintiff's residence was counted in favor of legislative jurisdiction only after it was determined that her change in residence was not motivated by forum shopping. 449 U.S. at 319.[5] More generally, this Court has insisted that jurisdiction

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lisher have any involvement with the particular publication but instead allow imposition of strict liability. *Guccione v. Hustler*, 7 Med. L. Rptr. 2077 (Ohio Ct. App. 1981).

The same court placed upon the defendant raising the defense of "satire" the burden of proving that it must have been manifestly clear that it could in no respect be regarded as an attack upon plaintiff's reputation.

[5] Counsel of record for Hustler magazine has argued at length in the academic literature that facts alleged for purely jurisdictional purposes are pretextual devices to circumvent the appropriate jurisdictional restrictions. Brilmayer, *How Contacts Count*, 1981 Sup. Ct. Rev. 77 (due process limits on in personam jurisdiction discount

not be predicated upon harm that is speculative, attenuated, hypothetical, or remote. *Warth v. Seldin*, 422 U.S. 490 (1975); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42 (1976). Otherwise a plaintiff might easily circumvent all jurisdictional restriction through self-serving declarations of hypothetical injury. These would be conveniently forgotten at trial when the time for concrete proof arrived. The sole reason for alleging them, the need to establish adjudicative jurisdiction, would have been fulfilled.

The clearest cases of forum interest are those involving local plaintiffs. *E.g., McGee v. International Life Insurance*, 355 U.S. 220, 223 (1957); *McNamee v. APS Insurance Agency, Inc.*, 110 Wis. 2d 72 (1983), *appeal dismissed for want of a substantial federal question*, 51 U.S. L.W. 3857 (5/31/83). *Cf. Crider v. Zurich Ins. Co.*, 380 U.S. 39, 42 (1965) (state interest in providing forum for residents overrides other state's localizing statute). There are several reasons for this. First, it is arguable that states rightly care more about providing a forum for locals. *Olberding v. Ill. Central R. Co.*, 346 U.S. 338, 341 (1953) (residents are primary intended beneficiaries of non-resident motorist statutes). See also R. Cramton, D. Currie, H. Kay *Conflict of Laws*, 524 (3d ed. 1981) (forum non conveniens not usually applied to suits brought by residents).

Second, the forum's interest is most persuasive where a "stay at home" plaintiff has been injured by a defendant whose activities have crossed state lines. *National Equipment Rental v. Szukhent*, 375 U.S. 311, 327 (1964) (Black, J., dissenting) (state

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contacts alleged solely to establish jurisdiction); Brilmayer, *Legitimate Interests in Multistate Problems*, 79 Mich. L. Rev. 1315 (1981) (same for choice of law and judgments); Brilmayer, *The Jurisprudence of Article III*, 93 Harv. L. Rev. 297, 299 (1979) (plaintiff cannot circumvent "personal injury" test by hypothesizing possible future harm; injury must be realistic). The present case offers a clear example of an imaginative plaintiff alleging facts solely to circumvent jurisdictional limits. Thus, counsel respectfully submits, this analogy warrants consideration.

interest in protection of rights of citizens who never left state). Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 Ill. Law Forum 533, 556-569. Plaintiffs that never left their home state should not have to travel to assert their claims in a forum with which they have no connection, for the same reason that defendants should not have to travel to a state with which *they* have no contact. Third, in some cases, noting that the plaintiff is a local resident may simply be a short-hand way of saying that substantial injury was suffered in the state, so that an element of the cause of action transpired there. States have interests in controversies when the operative events occurred there. This assessment of "state interests" does not necessarily involve differential treatment of residents and non-residents. In appropriate cases where a non-resident suffers tangible injury in the forum that is the focus of the dispute, an interest may exist. *See, e.g., World Wide Volkswagen*, 444 U.S. 286, 294 (1980) (accepting arguendo that interest may exist in a case where the plaintiff is a non-resident injured in the forum).

None of these reasons violate the primary focus on the defendant's contacts and burdens. In fact, that focus could hardly be inconsistent with assessment of the forum's interests, given that this Court listed both defendant's burdens and state interests *in the same paragraph* in *World Wide Volkswagen*. It is merely that where the defendant has no contact with the forum, plaintiff's contacts and state interests cannot be relied upon as substitutes. This was made clear in *Rush v. Savchuk*, 444 U.S. 320 (1980):

> [The shift in focus from the defendant's to the plaintiff's contacts] is forbidden by *International Shoe* and its progeny. *If a defendant has certain judicially cognizable ties with the State, a variety of factors relating to the particular cause of action may be relevant to the determination whether the exercise of jurisdiction would comport with 'traditional notions of fair play and substantial justice.'*

> . . . Here, however, the defendant has *no* contacts with the forum.

444 U.S. at 332 [emphasis added]. The state interest test was used by the courts below as one consideration in evaluation of the contacts alleged to exist, and not as an attempted substitute. The purpose of the "interest" requirement is simply to ensure that there be adequate justification when a state attempts to impose substantial burdens on out-of-state defendants.

If the court below was incorrect in inquiring into the interests of New Hampshire, then it was likewise incorrect in its assumption that jurisdiction would be permissible as based upon sufficient state interest if the plaintiff were a resident. If "state interests" are irrelevant as Keeton claims, then even resident plaintiffs lack claims sufficient to outweigh defendants' burdens in situations like the present case. The plaintiff's argument appears to be that the state would have an interest sufficient to support jurisdiction where the plaintiff was a resident, and that it is obliged to extend this interest to every case involving a nonresident as well. Pet. Brief at 7-9. This sort of bootstrapping would create due process jurisdiction in all cases that might be filed in New Hampshire.

If this Court were to reverse its line of precedent examining the state's interest in providing a forum, then it would thereby declare irrelevant all allegations of local injury. This would be undesirable because cases involving plausible reputational injury in the forum would suffer as a consequence. The result would be that no plaintiff would then gain advantage by virtue of affiliation with the forum. In *Rush v. Savchuk*, 444 U.S. 320 (1980), for example, this Court's decision that the state interest in supplying a forum was not dispositive meant that jurisdiction was denied in all cases across the board, including those brought by locals. This would not help Keeton, who still would not have satisfied the minimum contacts test. But it is the proper resolution if the Court determines that state interests cannot figure in the due process calculation.

C. The interests of the interstate system and the shared interests of the several states require dismissal.

Petitioner argues that "state lines have been obliterated by modern technology." Pet. Brief at 14. This Court's opinion in *World Wide Volkswagen* holds the opposite:

> [W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution.

444 U.S. at 293. The greater ease of defending foreign lawsuits afforded by modern technology is undeniable; yet it does not lead to the conclusion that due process limitations should be abandoned. Indeed, modern technology is equally advantageous to either party; it makes litigation in a distant forum feasible for plaintiffs and defendants alike. State sovereignty, however, involves more than convenience of litigation. *Id.* at 294.

One aspect of state sovereignty that the *World Wide Volkswagen* Court held to have been protected by the Framers was the sovereign power to try causes in their own courts. *Id.* at 293. This prerogative impels limitations on the power of a single state to try all of the cases that might be filed there. Prior to the advent of interstate recognition of judgments, this sovereign prerogative would be protected by the fact that enforcement exigencies would usually dictate filing in a state having a nexus with the dispute. Once judgments were guaranteed full faith and credit, however, the only method for ensuring a rational nexus between the forum and the litigation was due process limits on state court jurisdiction, since only jurisdictionally defective judgments would be subject to collateral attack. The sovereign prerogative of trying local cases in the sovereign's own courts was honored by limiting the power of other states to try cases having no local contacts. These limits function as the quid pro quo for full faith and credit.

No rational allocation of judicial business would assign this case to New Hampshire. The defendants have properly raised

venue objections in addition to their objections to personal jurisdiction. (34a) For purposes of determining venue, the plaintiff's self-serving allegations about where the cause of action arose are irrelevant, as they should be for purposes of determining personal jurisdiction. *Leroy v. Great Western United Corp.*, 443 U.S. 173, 185 (1979). The plaintiff cannot be given such control over where the lawsuit is tried, because such fictitious allegations of local injury allow a choice amongst fifty states to bring suit and facilitate complete circumvention of the policies underlying venue restrictions.

New York and Ohio are the two reasonable choices of forum. Jurisdiction, clearly, was available in Ohio. New York excepts defamation actions from its *in personam* jurisdiction statute regarding "tortious acts", New York Civil Practice Law §302(a)(2)(3). (Pet. 22a). However, New York courts have exercised jurisdiction over out-of-state defamation defendants when they qualified under other provisions of the code. *See, e.g., GTP Leisure Products, Inc. v. B-W Footwear Co., Inc.*, 55 A.D. 2d 1009, 391 N.Y.S. 2d 489 (4th Dept. 1977) (jurisdiction permissible in defamation action where defendant "transacted business" in New York). Other sections of the New York civil practice law, furthermore, expansively preserve all opportunities for jurisdiction previously available under New York common law.[6] The most likely explanation for Keeton's disinclination to file suit in her home state is, therefore, the fact that she had allowed the statutory time period to elapse.

Keeton has filed this action in New Hampshire solely to evade her home state's law, which Ohio properly respected. Her remedy if she dislikes either the long arm statute or the statute of limitations of New York is to influence her legislature to have

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[6] New York C.P.L.R. §301. New York has, moreover, taken a very expansive view of general jurisdiction under this provision. *See, e.g., Bryant v. Finnish National Airline*, 15 N.Y. 2d 426, 260 N.Y.S. 2d 625, 208 N.E. 2d 439 (1965). The fact that Hustler magazine has qualified to do business there would thus make jurisdiction proper.

it changed. Other states have no legitimate interest in enabling her to circumvent it. For New Hampshire courts to assert jurisdiction over this case and to try it in accordance with New Hampshire law would be a violation of its obligation to respect the co-equal sovereignty of its sister states.

From the perspective of the interstate judicial system, it is entirely sensible to allocate judicial business according to the parties' residence. Several federal statutes pursue exactly this course. For instance, the federal venue statute, 28 U.S.C. §1391, turns on (among other things) the residence of the plaintiff and the defendant. Nonresident plaintiffs are thus "discriminated against." Removal jurisdiction employs residency classifications as well. 28 U.S.C. §1441.

This Court, moreover, has consistently upheld state statutes refusing adjudication to claims held by non-residents where the events comprising the dispute had little or no connection with the state. *Anglo-American Provision Co. v. Davis*, 191 U.S. 373 (1903) (upholding state statute denying jurisdiction over suits by foreign corporations against foreign corporations on foreign judgments); *Chambers v. Baltimore Ohio R.R.*, 207 U.S. 142 (1907) (upholding door closing statute denying jurisdiction over actions for wrongful death occurring out of state except where the deceased was a citizen); *Douglas v. New Haven Railroad*, 279 U.S. 377 (1929) (similar statute upheld as based upon "rational considerations," 279 U.S. at 387). This Court has also explicitly approved the common law door closing doctrine of forum non conveniens, *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947), even though forum non conveniens is rarely used where the plaintiff is a forum resident, R. Cramton, D. Currie, H. Kay, *Conflict of Laws* 524 (3d ed. 1981). *See also Missouri ex rel Southern R. Co. v. Mayfield*, 340 U.S. 1 (1950) (upholding forum non conveniens dismissal of suit brought by non-resident). In interpreting the proper scope of the doctrine, the Court has been influenced by the fact that its usefulness would be destroyed if the substantive law the plaintiff chose was invariably

protected. *Piper Aircraft v. Reyno*, 454 U.S. 235, 249 (1981). *See also Gulf Oil, supra*, at 508-512 (dismissal appropriate even where inconvenient forum chosen in expectation of more generous jury verdict).

The shared state interest underlying residence-based allocation of access to adjudication is the prevention of forum shopping and the resulting interference with the prerogatives of other states. Thus, in upholding a state durational residency requirement for divorce, this Court approved measures that limited evasion of home-state divorce law by restricting adjudication:

> Iowa may insist that one seeking to initiate such a proceeding have the modicum of attachment to the State required here.
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> Such a requirement additionally furthers the State's . . . interest in . . . avoiding officious intermeddling in matters in which another State has a paramount interest . . . A state such as Iowa may quite reasonably decide that it does not wish to become a divorce mill . . .

Sosna v. Iowa, 419 U.S. 393, 407 (1975). *See also Martinez v. Bynum*, 51 U.S. L.W. 4524 (5/2/83) (upholding denial of free schooling when non-resident minor present primarily for purpose of attending public free schools). Due process in fact *requires* that jurisdiction be predicated upon domicile of one of the parties in divorce cases, *Williams v. North Carolina II*, 325 U.S. 226 (1945); *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954), or similar substantial connection not amounting to technical domicile. *See, e.g., Lauterbach v. Lauterbach*, 392 P.2d 24 (Ala. 1964) (serviceman stationed in state). Moreover, there is no discrimination problem where plaintiffs are merely required to sue in the forum most convenient to them.

D. Plaintiff's interests in obtaining convenient relief are not served by New Hampshire suit.

The courts below were appropriately sensitive to the final element in the *World Wide Volkswagen* calculus: the plaintiff's interest in obtaining convenient relief. New Hampshire is a "convenient" forum only in the sense that it is convenient for the plaintiff to be able to choose amongst fifty statutes of limitations. A rule that requires substantial injury in the forum protects all legitimate claims to convenient relief. For purposes of the convenience of the plaintiff and her witnesses, no forum would be more convenient than New York and few less convenient than New Hampshire. Obviously New Hampshire was not chosen for purposes of convenience at trial; in fact New Hampshire was chosen only after the action was already once dismissed in Ohio. But the plaintiff acquired no vested rights in the six year statute of limitations simply because research uncovered a state that had enacted one. *Piper Aircraft v. Reyno*, 452 U.S. 235, 247 (1981) (forum non conveniens dismissal not barred by likely resulting change in law).

The plaintiff's interest in obtaining convenient relief is strongest when the plaintiff has never left his or her home state and seeks to sue there. If the defendant has injected himself into the plaintiff's home state, then he has at least that relationship with that forum. But the stay-at-home plaintiff, conversely, may have no contact with the home state of the defendant. One party or the other must choose between litigating in an inconvenient forum and forgoing all opportunity to present his or her claims on the merits. This Court has shown concern for local plaintiffs faced with the prospect of travelling to a forum with which they have no contact; *McGee v. International Life Insurance*, 355 U.S. 220, 223 (1957). *Cf. Kulko v. Superior Court*, 436 U.S. 84, 100 (1978) (denying jurisdiction and discussing statutory scheme whereby plaintiff could obtain relief without leaving her home state). *See also Anselmi v. Denver Post, Inc.*, 552 F.2d 316, 325 (10th Cir. 1977), *cert. denied sub nom. Times Mirror Co. v. Anselmi*, 432 U.S. 911 (1977). If the defendant has initiated the

interstate contact tha. injures a stay-at-home plaintiff, it is fairer that he be the one to choose between default and inconvenient litigation than that this choice be forced upon the injured plaintiff. This rationale has no application where the plaintiff engages in blatant forum shopping for the most favorable law. While the Due Process Clause respects the plaintiff's interest in finding a forum, it does not guarantee a generous one, nor one with a long statute of limitations.

If the Due Process Clause continues to be interpreted to require a balancing of the defendant's burden, the forum interests, the interests of other states and of the multistate judicial system, and the plaintiff's interest in obtaining convenient relief, then the courts below were correct in dismissing the case. Even if the plaintiff were correct in her unsupported speculations of New Hampshire harm, which the district court rejected, New Hampshire's interest would be inadequate to justify a burden to the defendant of this sort, since the burden includes litigation of an enormous claim of injury totally unrelated to New Hampshire. This added burden of defending against claims of injury unrelated to New Hampshire is not coincidental; Keeton deliberately engineered this result. To allow jurisdiction here would violate this Court's admonition that there must be a nexus between the forum, the parties, and the litigation. It would, further, allow defamation plaintiffs to create jurisdiction out of whole cloth wherever they chose, thus flouting the orderly administration of justice.

II.

The First Amendment does not permit a State to penalize a publisher for the simple fact of minimal local sales by requiring the publisher to defend against claims of injury bearing no bona fide relationship to those sales.

The First Amendment is applicable to assertions of long arm jurisdiction as it is to every other exercise of state power. Were it otherwise, a state could penalize expression of unpopular views that were constitutionally protected simply by choosing

subjection to long arm jurisdiction as a sanction. Moreover, the First Amendment requires that a state have a substantial interest and that the methods chosen be narrowly tailored to meet that interest. Finally, a less restrictive and therefore preferable alternative would be for the plaintiff to bring suit in either the defendant's home state or the state where the principal portion of the injury was suffered.

A. *Applicability*

The First Amendment is applicable to assertions of long arm jurisdiction simply because there is no reason to exempt that sort of state action from constitutional standards that all other state action must meet. Long arm statutes enjoy no "preferred position". If New Hampshire had more expansive rules for asserting jurisdiction over newspapers advocating socialism than over those that did not, this Court would presumably not hesitate to invalidate those rules as impinging on free speech. The fact that a socialist newspaper owner might prevail on the merits of all litigation brought pursuant to this statute would surely be irrelevant. Similarly, First Amendment scrutiny would be appropriate if the state enacted a more expansive long arm statute where the defendent was a publisher than where he was a manufacturer, just as scrutiny is appropriate where the state taxes printer's ink more heavily than other goods. *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue,* 51 U.S. L.W. 4315 (3/29/83). Singling out publishers for more onerous treatment than other defendants implicates First Amendment values directly.

Even neutral procedural rules may be subject to First Amendment scrutiny when applied in free speech cases. *See generally* Monaghan, *First Amendment Due Process,* 83 Harv. L. Rev. 518 (1970); Note, *Jurisdiction Meets the Press: First Amendment Considerations in Jurisdictional Analysis,* 9 Hast. Con. L. Q. 975, 989 (1982). For example, in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975) and *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 247 n.6 (1974), this Court in-

terpreted leniently the usual appellate requirement that there be a final judgment in the state court below. Although deference to ordinary state court functioning is an important federalism concern counselling against piecemeal interlocutory review, *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), in *Cohn* and *Tornillo* the potential chilling effect of the state court ruling made interlocutory review appropriate. Other neutral procedural rules that have accommodated First Amendment values include procedure for examination of the record on appeal, *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964); standard of proof, *New York Times v. Sullivan, supra, Speiser v. Randall*, 357 U.S. 513 (1958); and waiver, *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The *Butts* plurality argued,

> the constitutional protection which Butts contends that Curtis has waived safeguards a freedom which is the 'matrix, the indispensable condition, of nearly every other freedom'. . . . Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling.

388 U.S. at 145. Mr. Justice Harlan then approvingly cited *New York Times v. Connor*, 365 F.2d 567 (5th Cir. 1966) (long arm jurisdiction against defamation defendants should be restricted because circulation of publications will be chilled).

The rule at issue here, at any rate, is not evenhanded in the way that the final judgments requirement is. The principle of personal jurisdiction that the petitioner urges has a disproportionate impact on First Amendment defendants, and should therefore be examined as closely as this Court would examine a long arm statute that was explicitly more aggressive in asserting jurisdiction over publishers than other types of defendants.

The disproportionate impact on publishers arises from the peculiar nature of multistate defamation actions. In multistate defamation actions, injury to reputation will be both intangible

and arguably widespread. Because such injury is intangible, plaintiffs will always be able to speculate that some minimal local injury might have occurred. To grant jurisdiction in such situations, ironically, gives an unwarranted advantage to public figures, who can more plausibly speculate reasons that some local persons may know their names. This directly contradicts *New York Times v. Sullivan*, 376 U.S. 254 (1964), which reduces protection for those who choose to thrust themselves into the public eye. *See also Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Wolston v. Reader's Digest Assoc., Inc.*, 443 U.S. 157 (1979). *Cf. Hanson v. Denkla*, 357 U.S. 235 (1958) (unilateral activity of plaintiff cannot create jurisdiction).

Moreover, it would allow defamation plaintiffs to choose whatever forum they like even if they know that the allegations of local injury will be utterly unsupportable at trial. In contrast, the typical tort plaintiff would never be able to hypothesize harm in fifty jurisdictions at once. If a plaintiff in Keeton's position may sue in New Hampshire, then there is no limit to where publishers can be forced to defend. By thrusting themselves into the public eye—indeed, by merely *alleging* that they had done so—defamation plaintiffs could manufacture jurisdiction in a manner simply not available to plaintiffs in other sorts of tort suits.

While the First Amendment does apply to assertions of long arm jurisdiction, it is not because of any "preferred position" that free speech rights might be thought to deserve. The applicability is a simple consequence of the fact that there is no reason to exempt long arm jurisdiction from constitutional scrutiny generally, and no reason to treat the First Amendment as a less potent limitation than any other restriction on state action. Other social policies also figure into the personal jurisdiction calculus. Note, *Constitutional Limitations on State Long Arm Jurisdiction*, 49 U. Chi. L. Rev. 156, 174 (1982); Carrington and Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 Mich. L. Rev. 227, 230 (1967).

More specifically, there are other constitutional provisions that directly limit the state's very right to hale a defendant into court. The Speech and Debate Clause is one, *Helstoski v. Meanor*, 442 U.S. 500 (1979). Double Jeopardy is another, *Abney v. United States*, 431 U.S. 651 (1977).

> In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him . . . Rather, he is contesting *the very authority of the government to hale him into court to face the charge against him.*

Abney v. United States, 431 U.S. 651, 659 (1977), cited in *Helstoski v. Meanor*, 442 U.S. 500, 507 (1979) (emphasis added by the *Helstoski* court). *See also Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (Speech or Debate Clause protects Congressmen from burden of having to defend). The free and robust debate that the clause was designed to encourage would be effectively discouraged by process costs even if the defendant expected ultimately to prevail. The government would have an effective sanction for deterring protected speech if there were no limits on its ability to hale the defendant into court.

What sets the First Amendment apart is only the extent to which the problem of process costs has been explicitly recognized. For example, whether or not a federal court may issue injunctions against pending state criminal proceedings in First Amendment cases depends upon whether process costs are being used as sanctions in and of themselves, and upon the reasonableness of relegating the defendant to raising his claim as a criminal defense. Where a criminal prosecution is already pending and there is no showing of bad faith, raising a substantive defense to criminal charges is as expeditious a method as any other, so that the process costs are neither greater than necessary nor utilized as sanctions. *See, e.g., Younger v. Harris*, 401 U.S. 37, 46 (1971) (threat must be one that cannot be eliminated by a successful defense). In contrast, the complainant will not be rel-

egated to his defenses on the merits where he raises constitutional objections to the very fairness of adjudication in a particular tribunal itself. *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973).

Keeton should not be free to use subjection to inconvenient litigation as a form of retaliation. In *New York Times v. Sullivan* this Court recognized the chilling effect of the prospect of defamation litigation. 376 U.S. 254, 279 (1964). *See also Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971) (plurality opinion). Keeton instituted two suits in New Hampshire after dismissal of her Ohio claim, one in federal court and one in state court after the first was dismissed, thus multiplying the burden of the defendant's litigation. All were based upon the same operative facts. The costs which Keeton has imposed upon the exercise of the right to publish could only be warranted by a compelling state interest.

B. *Legitimate Interests*

Petitioners seem to concede that New Hampshire's sole concern in entertaining the dispute is to penalize Hustler for the fact that its magazines were distributed there, regardless of the extent or existence of any local damage. Pet. Brief at 8. They further argue that Hustler might protect itself in the future by preventing distribution of its magazines within the state. *Id.* at 13. The *World Wide Volkswagen* language upon which they rely was not, however, designed to authorize states to violate the Bill of Rights by discouraging the exercise of constitutionally protected freedoms. Moreover, petitioners can hardly argue that assertion of jurisdiction would not constitute a chill when by their own admission the purpose and effect of the rule might be to cause magazine publishers to withdraw from the market.

The First Amendment requires that a state have a legitimate, indeed a compelling, interest at stake before it predicates sanctions upon writing, publishing, or speech. *Board of Education v. Barnette*, 319 U.S. 624, 639 (1943). Circulation is protected along with writing and publishing. "[I]ndeed, without the circulation, the publication would be of little value." *Ex*

Parte Jackson, 96 U.S. 727, 733 (1877); *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). This Court has said that "[t]he legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz v. Robert Welch*, 418 U.S. 323, 341 (1973). New Hampshire is not entitled to penalize a publisher simply because it believes that the publisher's magazines cause injury in other states; it should assert its *own* state interests. Nor can New Hampshire decide that, because it disapproves the contents, certain magazines that cause no tortious injury within the state should nevertheless not be allowed to circulate there. *Cf. New York Times v. Sullivan*, 376 U.S. 254, 292 (1964) (Supreme Court can determine for itself that no harm was done to plaintiff because falsehoods not "of and concerning" plaintiff; defamation suit must then be dismissed). *See also Rosenblatt v. Baer*, 383 U.S. 75 (1966). Neither should it be allowed to achieve these goals by using fictitious local injury as a pretext for jurisdiction and imposition of the burden of mounting an expensive defense as a sanction. The burden of defending must instead be justified by bona fide interest in reparations for local injury realistically suffered. Such interests are quite adequately served by less restrictive alternatives.

C. *Less Restrictive Alternatives*

When First Amendment rights are at stake, a state must use methods narrowly tailored to meet its legitimate goals. As held by *Gertz v. Welch*, 418 U.S. 323, 349 (1973), "[i]t is . . . appropriate to require that state remedies for defamatory falsehood reach no farther than necessary to protect the legitimate interest [of reparations] involved." One alternative that at first blush appears less restrictive would be to limit jurisdiction to damage suffered locally. When a state asserts long arm jurisdiction over a cause of action involving injury within the state, the defendant has a choice amongst three alternatives; to defend on the merits, to settle, or to default. If defense on the merits is highly inconvenient, the latter two options are still available. Each option protects the state interest in reparations. The defendant's fourth

choice is not to deal with independent distributors that send some of their stock of magazines into the state.

When a defendant chooses to do business in a state where the expense of defending is expected to be prohibitively high, the reason presumably is that he considers his likely profit sufficient to outweigh settlement or default of claims not worth adjudicating. He need not be concerned about the high expense of distant adjudication if the profits of the local market eclipse the liabilities it generates. Thus, he need not be forced to withdraw from local markets if his profits enable him to compensate local injury. There is some chilling effect, but the only publishers that are chilled are those whose expected local profits are less than the tortious harm they expect to impose, discounted by the improbability of their occurrence. The state's legitimate interests are adequately accommodated when only these publishers withdraw, and those that remain give reparations, through adjudication or settlement, for local tortious injury.

The option of paying reparations for local injury through settlement or default is simply unavailable if the state can assert jurisdiction over injury with which it has no connection. The stakes in the lawsuit are multiplied. Where the costs of litigation are expected to be high, removing the settlement and default options dramatically increases the pressure to withdraw: the "chilling effect". Yet the state has no interest in forcing from its market publishers willing to reimburse all of the costs the state is actually entitled to impose, namely the costs arising from local business. The imposition of "general jurisdiction" over injury unrelated to the state is more restrictive than necessary to accommodate legitimate interests because it forces such publishers from the market.

Restricting suit to local injury is unacceptable, however, because it means either a series of suits or forcing the plaintiff to elect a single state, with injury there providing the measure of damages. The latter alternative is unfair to plaintiffs; the former is unfair to plaintiffs and defendants alike. Requiring a series of suits is also insufficiently sensitive to the state's interests in

providing a convenient forum for adjudication and in conserving judicial resources. An alternative more advantageous to all concerned is to consolidate litigation in a single forum, either the defendant's home state, where process costs are lowest, or the state *in which the overbreadth is at a minimum*. This will be the principal place of the plaintiff's reputation, usually his or her state of residence. The plaintiff's interests are adequately served by allowing a choice between the plaintiff's and defendant's home state. So are the state's, since states need not impose higher costs than requiring adjudication of local injury unless their goal is to deter local circulation *regardless* of the existence and extent of local injury. This goal, however, crosses the boundary separating legitimate purposes of defamation law from impermissible restrictions on the right to publish.

The single publication rule reflects the policies that make a single suit in the plaintiff's or defendant's home state appropriate. In order to protect the right to publish, the rule requires a plaintiff to consolidate all actions in a single action. This does not mean that the plaintiff may choose any forum whatsoever and bring her entire action there. The single publication rule cannot create jurisdiction where none exists. It simply prohibits successive suits even where jurisdiction is available in several different states. The alternative of a single suit in either the defendant's home state or the principal location of the injury is therefore most consistent with First Amendment values. Lower courts that have considered jurisdiction over First Amendment defendants have all acted consistently with this requirement.[7]

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[7] Courts that have granted jurisdiction have done so on behalf of resident plaintiffs, sometimes citing a need to protect stay-at-home plaintiffs from having to travel to present their claims. *See, e.g., Anselmi v. Denver Post*, 552 F.2d 316 (10th Cir. 1977) *cert. denied*, 432 U.S. 911 (1977). One court that discussed the issue at the instigation of non resident plaintiffs denied jurisdiction. *Curtis v. Birdsong*, 360 F.2d 344 (5th Cir. 1966). Another court failed to address the issue, which was apparently waived because not raised by the defendant in a timely fashion. *Galonis v. National Broadcasting Co.*, 498 F.Supp.

(footnote continued on following page)

Keeton herself has demonstrated how burdensome defending multiple litigation can be. Upon losing the first action in Ohio, she merely shifted ground to New Hampshire and filed two additional actions there. Her activities definitely evince an attempt to harass the defendants, and to retaliate against them by subjecting them to the onerous burdens of litigation in a variety of fora, some distant from the defendants' base of operation and willing to impose unreasonable "procedural" rules such as a six year statute of limitations. The burden of defending a defamation action is substantial. Anderson, *Libel and Press Self Censorship*, 53 Tex. L. Rev. 422, 424, 435 (1975). And the burden of appearing in state after state, as long as the plaintiff can find one with a long statute of limitations, is simply too great to impose upon the exercise of the right to publish. It is entirely possible that a plaintiff might even find a state with a tolling provision in its statute of limitations, so that the cause of action would persist indefinitely. *Cf. Searle v. Cohn*, 455 U.S. 404 (1982) (upholding application of tolling provision to corporation that could have been reached by service of process). The First Amendment prohibits predicating such open ended liability upon fictitious allegations of minimal local reputation.

III.

The Commerce Clause prohibits predicating general jurisdiction over cases brought by nonresidents upon defendant's engaging in interstate commerce.

Even in situations where there are legitimate local interests, the Commerce Clause limits state regulatory jurisdiction that is overly broad and frustrates out-of-state activities that do not fall within the local interests. In *Edgar v. Mite*, 102 S.Ct. 2629 (1982),

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(footnote continued from preceding page)
789 (D.N.H. 1980). It has sometimes been suggested that First Amendment considerations limit jurisdiction somewhat even in suits brought by resident plaintiffs. See, e.g., *New York Times Co. v. Connor*, 365 F.2d 567 (5th Cir. 1966), although the opposite has also been declared. *Anselmi v. Denver Post, supra*, at 324.

this Court rejected a justification for a state business take-over law in the context of a Commerce Clause challenge. The law, which allowed the secretary of state to block a nationwide tender offer, was alleged to be supported by the Illinois interest in protecting resident shareholders. The Court wrote:

> While protecting local investors is plainly a legitimate state objective, the state has no legitimate interest in protecting non-resident shareholders. Insofar as Illinois burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law.

102 S.Ct. at 2642. The act, in its entirety, was therefore struck down.

The Commerce Clause limits assertions of state adjudicative jurisdiction, also. *See, e.g., Davis v. Farmers Cooperative Co.*, 262 U.S. 312 (1923). For this reason, a consistent string of precedents has held foreign corporations engaged in interstate commerce not to be amenable to general jurisdiction over causes of action that did not center around the defendant's forum activities. *L.&N.R. Co. v. Chatters*, 279 U.S. 320 (1928); *Simon v. Southern Railway*, 236 U.S. 115 (1914); *Old Wayne Life Ass'n. v. McDonough*, 204 U.S. 8 (1906). In *Michigan Central v. Mix*, 278 U.S. 492 (1928) this Court ordered dismissed, on commerce clause grounds, a cause of action unrelated to the defendant's forum activities because the plaintiff was a non-resident at the time that the cause of action accrued, and her subsequent move to the forum might have been "solely for the purpose of bringing the suit." 278 U.S. at 495. *Mix* was later explained on the grounds that

> [T]here was no proof of such a relation between the residence or activities of the suitor and the forum chosen for the suit as to make the choice a natural or suitable one, and rid the burden on the carrier of at least a measure of the hardship.

International Milling v. Columbia Co., 292 U.S. 511, 518 (1933). In contrast, jurisdiction was appropriate in *International Mill-*

ing because the plaintiff was

> [i]n a very real and practical sense, . . . a resident of the forum. . . . Certainly its relation to the locality was so permanent and intimate as to relieve it of the opprobrium of an impertinent intruder when it went into the local courts.

292 U.S. at 519. While this Court declined to hold that the residence of the suitor would necessarily be sufficient in and of itself, it held that residence "is a fact of high significance." 292 U.S. at 520. Elaborating, the Court added that plaintiffs who were local creditors should not be expected to leave their state to sue the defendant elsewhere.

As these two lines of cases suggest, the state has a legitimate concern with out-of-state activities that cause harm within the state to locals, and an interest in providing a forum in such cases. Defendants might well be expected to pay the costs of their local activities as the price of local business. "Interstate commerce must pay its own way." *Postal Telegraph Cable Co. v. Richmond*, 249 U.S. 252, 259-260 (1919). But the burden of mounting an inconvenient defense cannot be justified by reference to harm alleged to have occurred outside the state. Neither should defendants be compelled to pay costs allegedly caused by these out-of-state activities as a precondition to entry into the local market. The state has no interest in imposing these costs, per se, and no right to use imposition of these costs to penalize exercise of the right to engage in interstate commerce. Adjudication is unjustifiable because it is supported by neither a compensatory nor a deterrent interest.

Furthermore, even where there is minimal local impact, as in *Mite*, insofar as the state imposes upon portions of the activity that have no relation to the state, there is nothing to be weighed in the balance to sustain the law. The court of appeals in the instant case phrased it well. Like the *International Milling* Court, it did not hold that the plaintiff's residence was the only consideration.

> Rather, considering this case on the individual facts . . . we decide here only that the New Hampshire tail is too small to wag so large an out-of-state dog.

Pet. 18a

IV.

Jurisdiction over Larry Flynt and L.F.P., Inc. is improper.

The plaintiff, Kathy Keeton, apparently treats all defendants in this case as interchangeable, since no arguments directly address the minimum contacts between Larry Flynt and New Hampshire or L.F.P., Inc. and New Hampshire.[8] Yet contacts must be assessed individually, and not indiscriminately lumped together. *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (insurance company's contacts not attributable to named defendant). This is equally true with regard to corporations, their officers and employees, and other corporate entities with which they are affiliated. *See, e.g., Riverside and Dan River Cotton Mills v. Menefee*, 237 U.S. 189 (1915) (service of process on corporate officer while present in jurisdiction does not establish jurisdiction over corporation).

Specifically, jurisdiction over a subsidiary will not, without more, establish jurisdiction over the parent corporation. *Consolidated Textile Corp. v. Gregory*, 289 U.S. 85 (1933), *citing Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925); *People's Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79 (1918). *See generally* Comment, *Jurisdiction over Parent Corporations*, 51 Calif. L. Rev. 574 (1963). This is true even where the parent corporation owns all of, or a controlling interest in, the stock of a subsidiary. *Peterson v. Chicago, R.I. & P.R. Co.*, 205 U.S. 364 (1907); *Conley v. Matheison Alkali Works*, 190 U.S. 406 (1903). Keeton has not alleged, much less demonstrated, that

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[8] She likewise apparently assumes that venue, if proper for one, is proper for all. Yet L.F.P., Inc. and Larry Flynt are implicated in no cause of action arising in New Hampshire sufficient for purposes of federal venue.

Hustler Magazine was acting as the agent of or at the instructions of L.F.P., Inc., with regard to these particular issues. The uncontroverted affidavits suggest the opposite. (37a)

Jurisdiction is likewise lacking over Larry Flynt personally, who has not been shown to have exerted control over the material in question. Numerous courts have held that employees who acted in their official capacity are shielded from suit in their private capacity. *Chem Lab Products v. Stepanek*, 554 F.2d 371 (9th Cir. 1977); *Grove Press, Inc. v. Central Intelligence Agency*, 483 F. Supp. 132 (S.D.N.Y. 1980). This rule has been applied even where the employee's activities occurred within the jurisdiction. *Bulova Watch Co. v. K. Hattori*, 508 F.Supp. 1322 (E.D.N.Y. 1981). *See also, Marine Midland Bank N.A. v. Miller*, 664 F.2d 899 (2d Cir. 1981).

The wisdom of this policy in defamation cases is evident, especially where suit is brought in a forum other than the plaintiff's residence. A writer may happen to know where the future plaintiff resides or possesses substantial reputation. Typically, though, it will be completely unpredictable where the plaintiff will choose to sue if given a choice of fifty states. To the extent that it is predictable, it will be because some states stand out as the most plaintiff oriented of all, by advantageous rules of law or choice of law rules. This sort of predictability is almost worse than none at all, because it maximizes the chilling effect of that law and also the extent of that state's interference with the local prerogatives of other sovereign actors in the federal system.

Furthermore, the chilling effect on employees is more serious because employees do not gain corresponding advantages when circulation is increased in the same way as the corporation that publishes the magazine. Since employee compensation is not affected, as corporate revenues are, by an increase in circulation, the willingness to work for a nationwide publication or to expand limited circulation to nationwide proportions is not reinforced against the countervailing consideration of increased subjection to suit. Litigation may, moreover, be initiated after the employment relationship is terminated and when no help in

meeting legal fees will be forthcoming. This is unfair because the individual defendant has not personally availed himself of any benefits flowing from the local market, but has acted only on behalf of the corporation. *Bulova Watch, supra,* at 1347-1348.

CONCLUSION

It is not coincidental that the Due Process Clause, the First Amendment, and the Commerce Clause all require that the state have a legitimate interest. Any assertion of sovereign power must be evaluated in terms of the legitimacy of what the State seeks to achieve. The governmental interest must be balanced against the burdens that its assertion imposes upon the objecting party. In the present case, the New Hampshire interest is miniscule even if the plaintiff's hypothesized harm can be taken at face value. The burden is not proportionate to this interest, as will often be true when defendants are sued in fora chosen for their statute of limitations and not for their connection with the dispute. This burden is applicable virtually only to First Amendment defendants, and predicated upon the right to publish and to engage in interstate commerce. Since there is no legitimate interest sufficient to support this disproportionate burden, the decision of the two courts below should be affirmed.

Respectfully submitted.

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June 1983

NO. 82-485

Supreme Court, U.S.
FILED
NOV 1 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KATHY KEETON,

Petitioner,

vs.

HUSTLER MAGAZINE, INC., LARRY C. FLYNT, LFP, INC. and L.F.P., INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONER'S REPLY BRIEF

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NO. 82-485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KATHY KEETON,

Petitioner,

vs.

HUSTLER MAGAZINE, INC., LARRY C. FLYNT, LFP, INC. and L.F.P., INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONER'S REPLY BRIEF

Summary of Argument

The minimum contacts inquiry imposed by the due process clause to determine the propriety of the exercise of in personam jurisdiction over a non-resident defendant involves two kinds of analysis. Due process is satisfied if a defendant has engaged in purposeful activity aimed at the forum which directly relates to the cause of action. If this requirement is satisfied, there exist minimum contacts such that it is fair and reasonable for the defendant to respond to a lawsuit in the forum. Under this formula, there is no need to consider or balance other factors.

Balancing only becomes necessary where there exist judicially cognizable ties between the defendant and the forum which, however, do not amount to purposeful activity directly related to the cause of action. In such a case, other factors may nevertheless tip the scales in favor of exercising jurisdiction. These factors have been described by this Court as the forum state's interest in ajudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental social policies.

Respondents' theory of jurisdiction completely eliminates the first analysis, and invokes a balancing test as the *only* test for due process. This approach asks the Court to weigh the burden on the defendant against a variety of other interests. It ignores the purposeful acts directed at a forum to invoke the benefits and protections of its laws, which has been the crux of the jurisdictional standard for almost forty years.

In every case, respondents would apply a complex balancing test which focuses on numerous subjective factors rather than the normative considerations arising from defendant's forum-related bahavior. In addition, respondents would throw into the balance first amendment and commerce clause factors, both of which may be treated

in the context of forum non conveniens, but should have no relevance to the issue of personal jurisdiction.

The argument that no cause of action for defamation arose in New Hampshire because Keeton suffered minimal damages in that forum misconstrues the unique nature of the tort of libel. The cause of action for libel arises in every jurisdiction where the offending material is circulated, and proving the extent of injury is inappropriate to the jurisdictional inquiry.

I. Due process permits the assertion of jurisdiction in this case and does not require dismissal.

A. Where the defendant engages in purposeful activity within the forum, there exist minimum contacts such that it would be fair and reasonable to assert specific jurisdiction over claims relating to that activity.

It is not genuinely disputed that respondent Hustler has certain "minimum contacts" with New Hampshire. What is really at issue is whether other considerations should compel New Hampshire to refuse to entertain Keeton's lawsuit.

Since 1977, this Court has refined the "minimum contacts" test of *International Shoe* by eschewing a quantitative analysis in favor of a qualitative inquiry, and by explaining the parameters of "fair play and substantial justice" in terms of the defendant's purposeful activity directed at the forum which relates to plaintiff's cause of action*. It is this purposeful activity on the part of Hustler—the continuous, deliberate exploitation of the New Hampshire market by a national publication aimed at a nation-wide audience—which makes it reasonable and fair

* Purposeful activity is sufficient to sustain specific jurisdiction over claims relating to that activity, whereas activity within the forum that is regular and permanent may be sufficient to sustain general jurisdiction which can embrace even unrelated claims.

to require Hustler to defend a libel suit in New Hampshire arising from the circulation of its magazines there.

Undermining whatever remained of *Pennoyer* v. *Neff*, 95 U.S. 714 (1978), this Court in *Shaffer* v. *Heitner*, 433 U.S. 186, 204 (1977), held that:

> the relationship among the defendant, the forum and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction.

The jurisdiction asserted in *Shaffer* violated due process because of the absence of defendants' contacts with Delaware and the lack of any relationship among the sequestered property, the cause of action and the forum. *Id.* at 213.

In *Kulko* v. *Superior Court*, 436 U.S. 84, 97-98 (1978), this Court held that the quality and nature of the defendant father's activities in California did not warrant the exercise of personal jurisdiction over him in the mother's action for child custody and increased support. Because the father in *Kulko* "derives no personal or commercial benefit from his child's presence in California and . . . lacks any other relevant contact with the State", *id.* at 100-01, it was unfair to permit the exercise of jurisdiction over him.

This Court also concluded that personal jurisdiction could not be constitutionally exercised in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), on the ground that defendants lack "affiliating circumstances" with the forum, "avail themselves of none of the privileges and benefits of Oklahoma law" and do not sell cars to Oklahoma customers or "indirectly, through others, serve or seek to serve the Oklahoma market." *Id.* at 295. As in *Kulko*, this Court described the asserted nexus with the forum as a "fortuitous circumstance," arising from an "isolated occurrence." *Id.*

The teaching of these cases is that where the quality and nature of a defendant's forum activities do rise to the level of purposeful conduct so that it is reasonable to require him to defend there, other factors (such as the interests of the forum state) need not be evaluated. However, "a variety of factors relating to the particular cause of action," *Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980) may be relevant "in an appropriate case", *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. at 292, where the conduct is less than purposeful but the defendant has "judicially cognizable ties", *Rush* v. *Savchuk*, 444 U.S. at 332. It is submitted that once the essential criterion of purposeful activity is established, a forum's interest, or disinterest, cannot be used to deprive it of jurisdiction under the due process analysis.*

Each state's separate interest in the litigation is important in the choice of law calculus, but it is not determinative of the jurisdictional inquiry. Just as this Court has "rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute," *Shaffer* v. *Heitner*, 433 U.S. at 215, the selection of the law of a state other than the forum to govern substantive aspects of a particular case does not deprive the forum of its adjudicative power.

The effort to infect the jurisdictional issue with choice of law analysis has been spurned by this Court: "[The State] does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the [appellants]." *Shaffer* v.

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* State statutes enacted by a forum have already struck the balance representing the forum's interest, *see Insurance Corp.* v. *Compagnie des Bauxites*, 456 U.S. 694, 712 n.3 (1983) (Powell, J. concurring), and therefore the forum's interest should not ordinarily be scrutinized once again as part of the jurisdictional inquiry.

Heitner, 433 U.S. at 215, quoting *Hanson* v. *Denkla*, 357 U.S. 235 (1958). It has also been observed that in considering jurisdiction, "we are concerned solely with 'minimum's contacts, not the 'best' contacts." *Shaffer* v. *Heitner*, 433 U.S. at 228 (Brennan, J., concurring in part and dissenting in part). *Accord, World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. at 301 (Brennan, J., dissenting) ("The defendant has no constitutional entitlement to the best forum or, for that matter, to any particular forum. Under even the most restrictive reading of International Shoe, several States could have jurisdiction over a particular cause of action.") Similarly, this Court noted in *Kulko*, "the fact that California may be the 'center of gravity' for choice-of-law purposes does not mean that California has personal jurisdiction over the defendant", 436 U.S. at 98.

In *Rush* v. *Savchuk*, 444 U.S. at 332, this Court rejected the plaintiff's arguments favoring jurisdiction because "[t]he State's interests in providing a forum for its residents and in regulating the activities of insurance companies are substituted for its contacts with the defendant and the cause of action." In certain circumstances, strong policies may favor enforcing a forum's interest to uphold its assertion of jurisdiction. But the caution against substituting a forum's interest for the contracts of the defendant applies all the more forcefully when a forum's purported disinterest is used to defeat jurisdiction that exists under the prevailing standard. This is particularly so in this case since the Supreme Court of New Hampshire has interpreted that State's long-arm statute to extend to the fullest reach that due process allows. *Roy* v. *North American Newspaper Alliance*, 106 N.H. 92, 205 A.2d 844 (1964).

This Court has already decided cases where the forum's interest need not be reached in deciding whether due process permits the exercise of jurisdiction. In *Rush*, this

Court stated: "[i]f a defendant has certain judicially cognizable ties with a State, a variety of factors relating to the particular cause of action may be relevant to the determination whether the exercise of jurisdiction would comport with 'traditional notions of fair play and substantial justice'" 444 U.S. at 332 (citations omitted). However, because the majority in *Rush* found that there was *no* contact with the forum, there was no need to consider other relevant factors.

The identical analysis was made in *World-Wide Volkswagen* v. *Woodson*, where the absence of any contacts made it unnecessary to consider other factors, ('even if the forum State has a strong interest in applying its law to the controversy . . ." 444 U.S. at 294.

No balancing of secondary factors was required in *Hanson, Shaffer, Kulko, Rush* and *World-Wide Volkswagen* because the defendants in these cases lacked forum contacts; likewise, no balancing is required here because of the nature and quality of the conduct directed at the forum. These two situations represent opposite ends of the spectrum of forum-related activity. At one end, where there are no contacts, jurisdiction cannot be asserted and consideration of other factors cannot create it. At the other end, where there is purposeful conduct related to the cause of action, other considerations cannot prevent the exercise of jurisdiction. It is only in cases which fall in the middle of this spectrum because of the existence of judicially cognizable ties, that a balancing of other factors is necessary to determine whether due process would be satisfied.

In this case, the district court found that respondents' contacts with New Hampshire "were not random, isolated or transitory", but instead were regular and permanent, amounting to a "general course of conduct . . . purpose-

fully directed at New Hampshire" (Pet. 5a).* The "quality and nature" of respondents' New Hampshire activities were such as to make it reasonable for them to expect to defend a libel suit in that forum. Given such findings of fact by the district court,** the minimum contacts test is satisfied and other factors need not be considered.

B. Even if the forum's interest is a factor to be considered in this case, New Hampshire has expressed such an interest.

Assuming *arguendo* that the forum's interest is a relevant criterion to weigh in assessing jurisdiction, petitioner has identified three separate interests asserted by New Hampshire. Respondents have failed to refute or even address these several interests, and have been unable to isolate any statement on the part of New Hampshire's legislature or its courts which expresses a preference against entertaining this case. To the contrary, New Hampshire has indicated that it will construe its long-arm statute to the fullest extent permitted by due process. *Roy* v. *North American Newspaper Alliance,* 106 N.H. 92, 205 A.2d 844 (1964).

The three reasons why petitioner believes New Hampshire has an interest in asserting jurisdiction are:

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* A distinction can be drawn between the purposeful activity of a national publication like Hustler, which deliberately and regularly seeks to capture a national readership, and a local publication with no intention of circulating its product within the forum. *Compare Curtis Publishing Co.* v. *Golino,* 383 F.2d 586, 590-91 (5th Cir. 1967), *with New York Times Co.* v. *Connor,* 365 F.2d 567, 570-71 (5th Cir. 1966).

** The district court went beyond a finding of purposeful contacts, implying that they were regular and permanent. Such a finding supports the exercise of general jurisdiction, although that is an issue this Court need not reach in this case.

(1) In 1971, the New Hampshire Legislature amended its long-arm statute (Pet. 20a) to delete the former requirement that a tort be committed "against a resident of New Hampshire."

(2) In 1974, New Hampshire's highest court announced its "especial interest in exercising judicial jurisdiction over those who commit torts within its territory." *Leeper* v. *Leeper*, 114 N.H. 294, 298, 319 A.2d 626 (1974). Indeed, the Court of Appeals acknowledged New Hampshire's "desire to deter wrongful conduct within its boundaries; a desire to protect its citizens from reading libels about outsiders; or a desire to prevent injuries to the reputations of outsiders from occurring within the state because those outsiders may someday be hurt if they turn up in New Hampshire or because there may be a spillover effect on their reputations elsewhere" *Keeton* v. *Hustler Magazine, Inc.*, 682 F.2d 33, 34 (1st Cir. 1982) (citations omitted).

(3) New Hampshire has an interest in deterring criminal conduct, and has particularized that interest with reference to this situation by enacting a criminal defamation statute which makes it is a misdemeanor when a person "purposely communicates to any person, orally or in writing, any information which he knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule." N.H. Rev. Stat. Ann. §644:11 (A) (Pet. 21a).*

When combined with the purposeful nature of respondents' contacts with New Hampshire, these forum interests together and independently warrant the exercise of jurisdiction.

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* While this is not a jurisdictional statute, it nevertheless evidences a "particularized interest" on the part of New Hampshire to regulate intentional defamation. See *Kulko* v. *Superior Court*, 436 U.S. at 98; *McGee* v. *International Life Insurance Co.*, 350 U.S. 220, 224 (1957).

C. Respondents' balancing test would prematurely subject the jurisdictional inquiry to numerous amorphous factors, would be unworkable and would destroy all elements of predictability.

The formula advocated by respondents is concisely stated at page 5 of their brief under Summary of Argument: "[t]he Due Process minimum contacts standard for assertion of personal jurisdiction requires that the burden to the defendant be outweighed by the state's interest in litigating the dispute, the interstate judicial system's interest in efficient dispute resolution, and the plaintiff's interest in obtaining efficient relief." This is a skewed equation favoring defendants, and departs from this Court's past decisions.

The burden of defending in a forum other than defendant's home state is always very heavy because of the "inconvenient location" as well as the imposition of "local rules such as statutes of limitation" (Respondents' Brief, p. 5). Instead of focusing on the minimum contacts necessary to ensure fair play and substantial justice, respondents shift the inquiry to emphasize only the "burden to the defendant." In every forum other than defendants' home state, that burden weighs heavily and can only be overcome, according to respondents, if it is "outweighed" by other nebulous factors.

Although this Court has referred to these factors, *Kulko* v. *Superior Court,* 436 U.S. at 92, it has mentioned them as secondary considerations and has never applied them in the manner proposed by respondents. To the contrary, respondents' approach is baldly designed to favor defendants, and totally fails to account for a defendant's purposeful forum activities and contacts which render it fair and reasonable to require him to defend there, despite the burden of litigating in a distant forum.

Respondent's analysis adds an unnecessary and confusing layer of balancing to the minimum contacts standard. It misconstrues the original statement of the test

to require minimum contacts *plus* a showing of state interest *plus* various other amorphous factors. The original language of *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945), contains no such complex approach.

Injecting into the jurisdictional analysis considerations of a forum's interest, choice of law and substantive and social policies would render chaotic an area which already suffers from imprecision, where "few answers will be written in 'black and white. The greys are dominant and even among them the shades are innumerable' " *Kulko* v. *Superior Court*, 436 U.S. at 92, quoting *Estin* v. *Estin*, 334 U.S. 541, 545 (1948). *See World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. at 297.

Traditionally and logically, such matters as choice of law, forum non conveniens and procedural or substantive law are considered *after* jurisdiction has been established and *after* the court has determined that it has the adjudicative power to pursue these other topics. Enlarging the issue of jurisdiction to embrace a variety of other consideration would unnecessarily encumber the jurisdictional inquiry and render it unworkable. Under respondents' theory, every litigant, at the threshold jurisdictional stage, would resort to identifying and weighing hyopthesized (perhaps contrived) forum interests, as well as a lack of forum interest, in order to sway the jurisdictional balance.

Petitioner has attempted to define a jurisdictional test which derives from this Court's seminal decision in *International Shoe* and which tracks the intent and meaning of this Court's subsequent decisions in *McGee, Shaffer, Kulko, Rush* and *World-Wide Volkswagen*. The formula urged here is based upon normative considerations which can be consistently and rationally assessed. The behavior of a defendant in purposefully availing himself of the benefits and protections of the forum's laws is the key to this analysis. That behavior can be readily determined and objectively evaluated by a court. On the other hand, re-

spondents would impose an unwieldy balancing process that involves numerous subjective factors, including the countervailing considerations of the procedural and substantive law of all states, without any indication of what weight should be given to any of them. Such an approach will eviscerate the minimum contacts formula and render it meaningless.

II. Proof of substantial reputational interest in the forum is not a prerequisite for jurisdiction over a libel action.

The existence of a local reputation is not a jurisdictional prerequisite to the commencement of an action for defamation under New Hampshire law, just as an allegation of local reputation is not a necessary element for a libel cause of action, as erroneously urged by the respondents. Jurisdiction is instead based upon the nature and the quality of a defendant's forum-related contacts.

This case presents the classic issue of jurisdiction over a nonresident who commits a tort within the state. *Hess* v. *Pawlowski,* 274 U.S. 352 (1927); *Elkhart Engineering Corp.* v. *Dornier Werke,* 343 F.2d 861, 867 (5th Cir. 1965). Since respondents cannot seriously argue that New Hampshire has no right to entertain a lawsuit between two nonresidents over a cause of action which has arisen there, they instead argue that no cause of action occurred in New Hampshire because Keeton allegedly has no reputation there. But a cause of action in defamation arises wherever the libel is communicated.

Under the original common law rule, every communication of a libelous statement gave rise to a separate cause of action. *Novel* v. *Garrison,* 294 F. Supp. 825, 829 (N.D. Ill. 1969).* The elements of a cause of action for defama-

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* The single publication rule is a doctrine created to avoid a multiplicity of lawsuits for a single defamation. Even though

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tion are defined in the Restatement (Second) of the Law of Torts §558, and under that definition, an allegation of reputation is not a necessary element for a cause of action in libel.

Official Comment (d) to §558 explicitly states "*Actual harm to reputation not necessary to make communication defamatory,*" and explains that:

> [T]o be defamatory, it is not necessary that the communication actually cause harm to another's reputation or deter third persons from associating with him. Its character depends on its general tendency to have such an effect. In a particular case it may not do so either because the other's reputation is so hopelessly bad or so unassailable that no words can affect it harmfully or because of lack of creditability of the defamer.

Since neither the allegation of injury to reputation* nor the presence of a reputation is an essential element of a cause of action sounding in defamation, a plaintiff has a cause of action in every jurisdiction in which a defamatory statement is communicated. Thus, it is often said that "the place of the wrong is [the place] where the defamatory statement is communicated." *Buckley* v. *New York Post,* 373 F.2d 175, 178 (2d Cir. 1967). See *Haskell*

(Footnote continued from preceding page)

several forums may simultaneously acquire jurisdiction, it requires the plaintiff to recover all of his damages in a single action. But it has nothing to do with ascertaining jurisdiction. See *Buckley* v. *New York Post Corp.,* 373 F2d 175, 179-80 (2d Cir. 1967); *Anselmi* v. *Denver Post, Inc.,* 552 F.2d 316, 319 (10th cir.) *cert. denied sub nom. Times Mirror Co.* v. *Anselmi,* 432 U.S. 911 (1977).

* Most jurisdictions prohibit a libel plaintiff from introducing evidence concerning his reputation as part of his case in chief. *See* L. ELDREDGE, THE LAW OF DEFAMATION, §97 at 564 (1978).

v. *Bailey*, 63 F.2d 873, 875 (4th Cir. 1894) ("It is not the place where the libelous article is printed, but the place where it is published and circulated that makes the words used actionable").

In *Christopher* v. *American News Co.*, 171 F.2d 275 (7th Cir. 1948), an Ohio citizen brought a libel action in the Illinois district court against a New York corporation licensed and doing business in Illinois. The media defendant argued that: "[t]he action was local and could not be brought anywhere except in Indiana, the domiciliary state of plaintiff." *Id.* at 277. The Seventh Circuit reversed the dismissal of the complaint, explaining:

> Authority is uniform on the proposition that libel is not a local but a transitory action. The plaintiff's fame or anonymity in the state of the forum is material only on the determination of damages or at best as an aid in ascertaining the effect of libelous words on the mind of an ordinary reader.

Id. (citations omitted).

The special kind of harm inflicted by defamation is not confined to a forum where plaintiff is well known. This dubious concept is a legal fiction that has arisen primarily in the area of choice of law analysis. Restatement (Second) of Conflict of Laws §150 (1971). The victim of a libel may suffer an adverse impact upon his reputation even in a state in which he has hitherto been anonymous. The communication of the libel by itself creates a negative reputation among the residents of the jurisdiction. If Kathy Keeton, for example, had never set foot in New Hampshire, but intended to purchase a summer home there after the libel was circulated, she might very well encounter difficulties due to the bad reputation created by the defamatory statements in Hustler magazine.* In-

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* One purpose of libel law is to provide redress for these "subtle harms", even for "a lady who lives in Paris, and who

(Footnote continued on following page)

deed, the First Circuit expressly recognized New Hampshire's interest to "prevent injuries to the *reputations of outsiders* from occurring within the state because *outsiders may someday be hurt if they turn up in New Hampshire* or because there may be spillover effect on their reputations elsewhere." *Keeton* v. *Hustler Magazine, Inc.*, 682 F.2d 33, 34 (1st Cir. 1982) (emphasis added).

The devastating impact of libel has been described as a form of "psychic mayhem" and compared to "physical mutilation". TRIBE, AMERICAN CONSTITUTIONAL LAW, at 648-49 (1st ed. 1978). The kind of scurrilous attack upon Kathy Keeton intentionally committed by respondents strikes at her dignity, inflicts traumatic emotional injury and assaults her self-image. *Rosenblatt* v. *Baer*, 383 U.S. 75, 92 (1966) (Stewart, J. concurring) (the law of libel "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty"). The fear that persons who never even knew Kathy Keeton now believe that she has a venereal disease (8a), displays her body in obscene poses as a "Fifty-Year-Old Centerfold" (15a-32a) utters profanities and is sexually promiscuous (19a) is equally as upsetting to her as knowing that this libel has been read by her family, friends and business associates. As Professor Eldredge has written:

> One who believes that he appears to be ridiculous in the eyes of his fellowmen can suffer an agony of emotional distress which may be more painful, and for more lasting than the pain from the severed nerves of a torn-off arm.

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has not lost, so far as we know, a single friend and who has not been able to show that her reputation has in any way suffered from the publication of this unfortunate picture play. . . ." L. ELDREDGE, THE LAW OF DEFAMATION, §4, at 9-10 (1978), quoting the English case of *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures, Ltd.*, 50 T.L.R. 581 (C.A. 1934).

L. ELDREDGE, LAW OF DEFAMATION, §4 at 11 (1978). Thus, the "psychic mayhem" intentionally inflicted upon Kathy Keeton by the unique tort of libel does not depend upon the extent to which people know her, but rather upon the extent to which the publication was disseminated.

III. Personal jurisdiction is measured only by the due process clause: other constitutional considerations are inapplicable to the minimum contacts test.

The due process clause of the fourteenth amendment is the only restraint imposed by the Constitution upon the exercise of personal jurisdiction. Other constitutional provisions, such as the first amendment and the commerce clause, raised now for the first time by the respondents, do not affect the exercise of personal jurisdiction.

This Court has explained how the limitation on state adjudicative power is a by-product of the due process clause, which is the only constitutional provision that imposes a restriction on personal jurisdiction:

> The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. *That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.*

Insurance Corp. v. *Compagnie des Bauxites*, 456 U.S. 694, 702 n.10 (1982) (emphasis added).

Although they do not function to limit jurisdiction, considerations relating to interstate commerce and freedom of speech and press are accomodated by the doctrine of forum non conveniens. This Court has recognized that a court may decline to exercise its adjudicative power under the doctrine of forum non conveniens. *Piper Aircraft Co.* v.

Reyno, 454 U.S. 235 (1981). But a district court has no power to dismiss an action on that ground if the transfer provisions of 28 U.S.C.A. §1404(a) are applicable. *Collins* v. *American Auto Ins. Co.*, 230 F.2d 416 (2d Cir.), *cert. dism'd per stipulation*, 352 U.S. 802 (1956); *Vanity Fair Mills* v. *T. Eaton Co.*, 234 F.2d 633, 645 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956); *Headrick* v. *Atchinson, T.&S.F. R.R. Co.*, 182 F.2d 305, 308-09 (10th Cir 1950).

Cf. Moses H. Cone Hospital v. *Mercury Construction Co.*, 51 U.S.L.W. 4156, 4159 (1983) (the "federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'")

This is especially compelling when the only real prejudice the defendant alleges it will suffer is the possibility that the transferee forum may apply an unfavorable statute of limitations. *Cf. Kloeckner Reederei und Kohlenhandel* v. *A/S Hakedal*, 210 F.2d 754, 757 (2d Cir.) *cert. dism'd per stipulation*, 348 U.S. 801 (1954) ("defendant not entitled to dismissal on grounds of forum non conveniens solely because the law of the original forum is less favorable to him than the law of the alternative forum").

The decision to dismiss this action on the basis that another jurisdiction might apply an unfavorable law, moreover, raises the practical problem of "reverse forum shopping" by the defendant. This Court explained the danger in *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 433 n.19 (1981): "[i]n holding that the possibility of a change in law unfavorable to the plaintiff should not be given substantial weight, we also necessarily hold that the possibility of a change in law favorable to the defendant should not be considered . . . ."

Finally, the application of the doctrine of forum non conveniens is inappropriate here because there is no alternate forum where petitioner can litigate her claim, having diligently acted to protect her rights and promptly

placing respondents on notice of her claims.* *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 506-07 (1947). *See Piper Aircraft Co.* v. *Reyno*, 454 U.S. at 255 n.22.

A. The commerce clause does not limit the Court's power over the person of the defendant.

Respondents improperly rely on the line of cases represented by *Davis* v. *Farmers Cooperative Co.*, 262 U.S. 312 (1923), for the proposition that the commerce clause acts to deprive a court of jurisdiction that would otherwise exist. This line of Supreme Court cases which culminated in *B & O R.R.* v. *Kepner*, 314 U.S. 44 (1941), was rendered obsolete by the passage in 1948 of 28 U.S. C.A. §1404a) (West 1976).** Upholding jurisdiction over a non-resident railroad in *Scanapico* v. *Richmond, F. & P. R.R.*, 439 F.2d 17, 28-29 (2d Cir. 1970), Judge Hays explained:

> The majority has resurrected a whole battery of cases dating from thirty-five to fifty years ago in order to materialize the ghost of a long-outmoded view of 'burden on interstate commerce. As the majority opinion of the panel said:

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* Shortly after the Ohio litigation was commenced, defendants moved for dismissal of the claims relating to the defamatory cartoon on the ground of the statute of limitations. Applying Ohio law, on May 15, 1978, the trial court dismissed the libel count but did not dismiss the privacy count, holding that the Ohio four-year statute of limitations applied. This Court may take judicial notice of that decision. 10 MOORE'S FEDERAL PRACTICE, §2.01.02 [1] (1982). Accordingly, Keeton believed that her claim was preserved, until the trial court subsequently reversed itself by a decision dated February 19, 1980 (the very day the trial was to commence), and dismissed Keeton's privacy claim by applying New York's one-year statute of limitations.

** This statute was enacted to avoid the extreme remedy of dismissal as the only alternative to forcing the defendant to litigate in an inconvenient forum.

> "The cases which appellant cites hark back to earlier days and reflect a far less fully developed state of our national economy. In McGee v. International Life Insurance Co., [355 U.S. 220, 78 S.Ct. 199, 2 L.Ed2d 223 (1957)] the Court said at p. 223:
>
> > 'modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.'

In a footnote, Judge Hays indicated that transfer rather than dismissal was the alternative manner of handling the case. *Id.* at 29. Disregarding the "ghost" of the *Davis* line of cases, Judge Hays concluded that jurisdiction under such circumstances could be properly asserted "whether or not plaintiff is a resident." *Id.* at 29.

The Sixth Circuit in *Southern Machine Co.* v. *Mohasco Indus.*, 401 F.2d 374, 378 n.6 (6th Cir. 1968), explicitly recognized that the commerce clause considerations raised by the *Davis* line of cases are no more than a specific application of the familiar doctrine of forum non conveniens.

Similarly, in *Buckley* v. *New York Post Co.*, 373 F.2d 175, 184 and n.9 (2d Cir. 1967), Judge Friendly stated that the issue confronting the Court in the *Davis* line of cases involved the doctrine of forum non conveniens and not the minimum contacts requirements of the due process clause.

In any event, the *Davis* line of cases involved objections to claims that did not relate to the defendant's forum activities, a situation far different from this case. Moreover, this Court in *Miles* v. *Illinois Central R.R. Co.*, 315 U.S 698, 702 n.3 (1941), limited the principles of those cases "to the rule that suits upon extra-state causes of action under F.E.L.A. burden commerce and will not be permitted in courts of states where defendant carriers do no more than maintain facilities for solicitation of business." *See also B & O R.R. Co.* v. *Kepner*, 314 U.S. at 55 n.11.

B. First Amendment considerations do not inhibit the exercise of jurisdiction over the person of defendant.

Since the evolution of the doctrine of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), the media has achieved a notable array of substantive defenses. This Court has recently questioned the need for and the fairness of the trend to expand the media's procedural rights under the guise of first amendment considerations. *Hutchinson* v. *Proxmire*, 443 U.S. 111, 120 n.9 (1979) (summary judgment); *Herbert* v. *Lando*, 441 U.S. 153 (1979) (inquiry into editorial processes). The doctrine of *New York Times* v. *Connor*, 365 F.2d 567 (5th Cir. 1966), relied upon by respondents for their first amendment argument, is a concept whose time has come and gone.*

Even the Fifth Circuit, which decided *Connor*, has since strictly limited its applicability. *Compare New York Times Co.* v. *Connor, with Curtis Publishing Co.* v. *Golino*, 383 F.2d 586 (5th Cir. 1967). In *Edwards* v. *Associated Press*, 512 F.2d 258, 266 (5th Cir. 1975), the Fifth Circuit devalued the precedential value of the *Connor* principle by describing it as a mere "cautionary note." A unanimous Tenth Circuit panel later indicated that the *Connor* rule was no longer even the law of the Fifth Circuit. *Anselmi* v. *Denver Post, Inc.*, 552 F.2d 316, 324 (10th Cir. 1977), *cert. denied sub nom. Times Mirror Co.* v. *Anselmi*, 432 U.S. 911 (1977). Referring to the Fifth Circuit's decisions in *Connor* and *Buckley* v. *New York Times Co.*, 338 F.2d 470 (5th Cir. 1964), Judge Friendly observed that:

> We are not sure whether the law made by these hard cases was good or bad. Newspapers, magazines, and broadcasting companies are businesses con-

---

* The Second Circuit in *Buckley* v. *New York Post Co.*, 373 F.2d 175, 182 (2d Cir. 1967), declined to follow the Fifth Circuit in *New York Times* v. *Connor*, 365 F.2d 567 (5th Cir. 1966), stating that the: "[h]azards to publishers in libel actions have recently been much mitigated by the development of substantive principles under the First Amendment."

> ducted for profit and often made very large ones. Like other enterprises that inflict damage in the course of performing a service highly useful to the public, such as providers of food or shelter or manufacturers of drugs designed to ease or prolong life, they must pay the freight.

Buckley v. *New York Post Corp.*, 373 F.2d 175, 182 (2d Cir. 1967).

Judge Friendly was of the view that any considerat on of first amendment principles is more appropriately made in the context of forum non conveniens rather than jurisdiction. *Id.* at 183-84. Significantly, no other circuit has adopted the rule, and most courts and commentators who have considered the doctrine have criticized it.

CONCLUSION

The judgment of the court below should be reversed and the action reinstated.

Respectfully submitted,

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Dated: November 1, 1983

MOTION FILED

JUN 29 1983

No. 82-485

IN THE

Supreme Court of the United States

October Term, 1982

KATHY KEETON,

Petitioner,

vs.

HUSTLER MAGAZINE, INC., LARRY C. FLYNT, LFP, INC. and L.F.P., INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

IN SUPPORT OF AFFIRMANCE

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*, AND BRIEF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. AS *AMICUS CURIAE*

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MOTION OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Association of American Publishers, Inc. ("AAP") hereby seeks leave of this Court to file a brief as *amicus curiae*, pursuant to Rule 36 of the Rules of this Court, urging affirmance of the decision of the court below in favor of respondents Hustler Magazine, Inc. et al., holding that the Due Process Clause of the Fourteenth Amendment precludes an out-of-state plaintiff from suing an out-of-state publisher for libel in a forum which has little interest in adjudicating the dispute. This motion is necessitated by the refusal of counsel for petitioner, Kathy Keeton, to grant permission to file such brief. AAP's brief, conditionally filed herewith, is annexed to this motion.

Interest of the *Amicus*

The AAP is the major national trade association for book publishers in the United States. Its more than 300 members include large commercial book publishers and small or non-profit publishers, university presses and scholarly associations. Many of these publishers market their books on a national basis, often through independent distributors who in turn sell to bookstores, schools, universities and libraries across the country. Others are regional publishers who, while often hoping that their books will achieve a national market, distribute on a predominantly local basis. All of the AAP's members share a firm commitment to the free dissemination of ideas and the need to prevent erosion of First Amendment rights.

This lawsuit involves not merely the application of the due process rules developed by this Court to the exercise of a state's long-arm jurisdiction; it involves as well a fundamental determination of the extent to which a private litigant is to be permitted to wreak havoc with the policy determinations of 50 individual states concerning the time limits within which libel actions must be commenced. By narrowly circumscribing such time limits, those policy determinations quite uniformly reflect a sensitivity to the "need for a vigorous and uninhibited press" notwithstanding "the legitimate interest in redressing wrongful injury." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).*

* The Appendix to the annexed brief sets forth the statutes of limitations for libel actions in the 50 states and the District of Columbia. Twenty-eight of these statutes mandate the bringing of libel actions within one year or less, while seventeen provide a two-year period.

Petitioner Keeton simply went shopping for a forum —any forum—whose statute of limitations for libel actions had not yet run by the time her initial lawsuit against the publisher respondents had been determined to be time barred in the State of Ohio. The lower court opinions here properly noted that the forum so selected—New Hampshire —otherwise had little reason to adjudicate Keeton's libel claim, since neither she nor the publisher respondents were residents of, or otherwise had substantial contacts with, the state, and since any injury to Keeton's reputation was caused by activity outside of New Hampshire.

Most importantly, the court of appeals recognized that the very state statute-of-limitations policies designed to "provide . . . publishers security against lawsuits . . . long delayed" would be thwarted were libel plaintiffs such as Keeton permitted to bring actions for all damages suffered everywhere* "as long as there is any state anywhere with a statute of limitations that has not yet expired." (18a)**

AAP's members are justifiably proud of their tradition of fulfilling their First Amendment mandate by providing the nation with the means to engage in "uninhibited, robust, and wide-open" debate on issues of public importance. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). In fulfilling this duty, AAP's members also constantly live with the threat of punitive and potentially de-

* Under the "single-publication" rule of most jurisdictions, a libel plaintiff is permitted to bring only a single lawsuit for all injuries alleged to be sustained arising out of a particular publication. *See, e.g., Gregoire* v. *G.P. Putnam's Sons*, 298 N.Y. 119, 124 (1948).

** The lower court opinions are cited by reference to the Appendix to the Petition for Certiorari.

bilitating libel actions. The decision of the court of appeals in this case—determining the inappropriateness both of subjecting a publisher to suit in a remote jurisdiction with which it (let alone the plaintiff) has little relationship, and of permitting libel plaintiffs, through blatant forum shopping, to circumvent the protections sought to be provided to publishers by individual state policies—gives the necessary encouragement to publishers to continue in their assigned task. Conversely, were that decision to be overturned by this Court, the negative impact upon a vigorous publishing process in general, and upon the creation and broad dissemination of books in particular, would be significant.

The annexed brief presents the AAP's view as to why the decisions below unquestionably were correct, under governing due process and First Amendment principles. It also addresses the untoward implications for book publishers of any other result. We therefore respectfully request that AAP's motion for leave to file the annexed brief be granted.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF ON BEHALF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. AS *AMICUS CURIAE*

Interest of the *Amicus*

The interest of the *amicus curiae* is set forth in the preceding motion papers.

Statement of the Case

This case presents the issue of whether, consistent with the First and Fourteenth Amendments, a court may assert

in personam jurisdiction in a libel action against a magazine publisher where the publisher's contacts with the forum state are minimal at best, and the forum state lacks any interest in adjudicating the dispute because the plaintiff is a nonresident of the forum state and has no reputation to protect there. It is critical to the free dissemination of ideas and information that the decision of the court below, resolving this question in favor of the publisher defendants, be affirmed.

Because the facts and procedural history of this case are somewhat unusual and figured prominently in the lower courts' decisions, they will be briefly summarized here.

Petitioner Kathy Keeton is a resident of the State of New York and is associate publisher and senior vice president of Penthouse magazine. Keeton commenced an action in the United States District Court for the District of New Hampshire in October of 1980, alleging that she was libelled by photographs and text appearing in the September, 1975 issue of Hustler magazine and a cartoon appearing in the May, 1976 issue. This action, however, was not the first brought by Keeton over these publications. In 1977, Keeton sued the same parties who are respondents herein in Ohio (the state of incorporation of Hustler Magazine, Inc. and LFP, Inc.), alleging libel and invasion of privacy. Her libel claim was dismissed on the grounds that it was barred by the Ohio statute of limitations; her invasion of privacy claim was dismissed on the grounds that it was barred by the migratory New York statute of limitations. By that time, Keeton's claim was also time barred in every other state except New Hampshire, which had a six-year

ance with the applicable law. Looking first only at the magazine publishers' contacts with New Hampshire, the court held that, were protection of such publishers the only relevant concern, the court could find, although just barely, that due process standards had been met. (5a) However, the district court correctly felt compelled to look beyond the publishers' contacts with the forum state to the reasonableness of asserting jurisdiction from the standpoint of the forum state's interest in adjudicating the dispute. In that context, the court declined to assert jurisdiction, finding that Keeton had failed to demonstrate any connection with the state and that the state had no interest in adjudicating the dispute that was not shared by every other state and foreign country in which Hustler is published.[3]

In its opinion affirming the decision of the district court, the United States Court of Appeals for the First Circuit likewise examined not only the publishers' sparse connections with New Hampshire, but the extent of Keeton's contacts with the state as well. Such examination led the court of appeals to the wholly appropriate conclusion that, given that Keeton's only contact with New Hampshire was the appearance of her name in fine print on the credits page of three magazines distributed monthly in New Hampshire, and further given that the great majority of alleged injury to her reputation occurred outside New Hampshire, New Hampshire lacked the state interest necessary to support a finding of personal jurisdiction over an out-of-state publisher having minimal contacts with the

3. The court specifically found that the appearance of Keeton's name on the credit pages of Penthouse magazine did not create a reputation for her in New Hampshire. (7a)

forum. In so concluding, the appeals court properly interpreted and followed the decisions and policies of this Court applying the principles of due process to the question of personal jurisdiction in such a fact setting.

ARGUMENT

I. The courts below correctly held that the Due Process Clause precludes an out-of-state plaintiff from suing an out-of-state publisher for libel where the publisher's contacts with the forum state were minimal, the plaintiff's contacts even more minimal, and the forum state's interest negligible.

The decisions of this Court make plain that the propriety of asserting personal jurisdiction in a given case consistent with the Due Process Clause of the Fourteenth Amendment depends upon a multiplicity of factors, including, but by no means limited to, the defendant's contacts with the forum state. The appropriate factors to be considered were recently enumerated by the Court in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). After noting that due process fundamentally entails the notion of "reasonableness" or "fairness"—a notion established by this Court in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945),[4] and firmly engrafted upon the

4. In *International Shoe* the Court noted that the due process determination must take account of "such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there," as well as of "the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." 326 U.S. at 317, 319.

law of due process by virtue of subsequent decisions[5]—the Court stated:

> Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, *see McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 223 (1957); the plaintiff's interest in obtaining convenient and effective relief, *see Kulko* v. *California Superior Court, supra*, at 92, at least when that interest is not adequately protected by the plaintiff's power to choose the forum, *cf. Shaffer* v. *Heitner*, 433 U.S. 186, 211, n.37 (1977); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, *see Kulko* v. *California Superior Court, supra*, at 93, 98.

Id. at 292.

The court of appeals and, before it, the district court, faithfully weighed these factors in the context of the facts presented. That they properly gave weight to factors other than merely the defendant publishers' contacts with the forum is hardly a basis for reversal, as Keeton suggests. Rather, as we discuss below, the lower courts' conclusion that it was inappropriate to allow petitioner Keeton to maintain her libel suit in New Hampshire reflected an unexceptionable application of the governing due process considerations laid down by this Court in *World-Wide Volkswagen* and other cases.[6]

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5. *See McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957); *Hanson* v. *Denckla*, 357 U.S. 235 (1958).

6. We discuss in Point II of this brief the additional support for the result below based upon the special role of the press in our society and the First Amendment considerations that accordingly must be brought to bear on a due process analysis involving press activities.

The appeals court thus appropriately examined the State of New Hampshire's interest in adjudicating Keeton's libel claim. It having been determined that Keeton was not herself a resident of New Hampshire, that her sole contact with the state was the appearance of her name on the credits page of a magazine read by a relative handful of New Hampshire residents, and that "[n]early all the damages the plaintiff seeks arise from injury to her reputation outside of New Hampshire caused by activities that took place outside of New Hampshire" (18a), the court's conclusion that "New Hampshire has no special interest in protecting a nonresident against this out-of-state activity" (*id.*) was entirely sound and in keeping with this Court's prior due process decisions.[7]

Likewise, the courts below recognized that Keeton had the opportunity to protect her "interest in obtaining convenient and effective relief" by bringing her action in a "forum having a rational nexus with the parties and events which give rise to this action." (7a) Keeton herself so acknowledged, having initially attempted to bring suit in Ohio, where the corporate defendants are located. The fact that her suit was dismissed there because it was not timely filed was regarded by the appeals court as providing no justification for the subsequent initiation of litigation in

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7. *Compare Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958) (exercise of jurisdiction properly declined where defendant's limited contacts with forum state did not provide state with "a substantial connection" with subject matter of suit), *with McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (jurisdiction predicated on contract with "substantial connection" with state and state's "manifest interest" in protecting its own residents). *See also Curtis Publishing Co. v. Birdsong*, 360 F.2d 344, 346 (5th Cir. 1966) (court declines to assert jurisdiction in libel action, noting this Court's requirement that "the State which seeks to subject a nonresident to its judicial jurisdiction must have a definite interest in the litigation").

New Hampshire. Indeed, in determining that the opposite conclusion was warranted, the court observed:

> [T]hese very circumstances suggest why it would be *unfair* to allow plaintiff to sue. . . . [S]tatutes of limitations in general—and certainly in plaintiff's home state—penalize a plaintiff who sleeps on her rights, as has Ms. Keeton, and provide defendant publishers security against lawsuits so long delayed. To allow a multistate defamation suit here would thwart such policies by exposing a publisher to the risk of suit covering all damage suffered everywhere as long as there is any state anywhere with a statute of limitations that has not yet expired.

(18a, emphasis added, citations omitted)

In so rebuffing Keeton's back-door attempt to revive her dead libel claim, the court below again acted entirely within the proper scope of its constitutional mandate. This Court has repeatedly emphasized as a fundamentally limiting factor in the due process analysis even outside of the context of libel actions, the "territorial limitations on the power of the respective States," *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958), and the need "to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. at 291-92.

The court of appeals further recognized that yet another consideration articulated in *World-Wide Volkswagen* —the interest in efficient resolution of controversies and furthering fundamental state policies—would be better served by a refusal to assert personal jurisdiction in this case. The court noted in this connection that because of

the peculiar nature of a libel action, in which, under the single publication rule adopted in most jurisdictions, a plaintiff must seek to recover in one suit all damages suffered, the interests of the federal system and of the several states would have been better served had Keeton brought her claim in a timely manner in a state where she had suffered a cognizable injury to her reputation and where the defendants' contacts were far more substantial.

For all of the foregoing reasons, the decisions below reached the correct conclusion based upon this Court's controlling due process precedents.

II. The decision below should be affirmed based upon First Amendment considerations and the nature of the publishing process.

Petitioner Keeton would have this Court regard this case as if it were a products liability action involving strictly commercial goods. But of course it is not. The court of appeals noted the "special" nature of this case, involving as it does "a libel allegedly caused by a publication that circulated in more than one state." (17a) In light of this "distinctive element" (*id.*), the court below correctly exhibited especial sensitivity to the implications of asserting jurisdiction over the publishing defendants.

As we discuss below, the lower court's solicitude for the activities of publishers comports with persuasive authority which mandates that due consideration be given to the First Amendment in a jurisdictional determination such as that posed here (Part A), and reflects a commendable recognition of the realities of the publishing process (Part B).

For these reasons as well, the decision below should be affirmed.

A. The First Amendment precludes the assertion of jurisdiction in this case

Even if this Court were to conclude that, applying a traditional due process analysis, it might be appropriate to assert jurisdiction over publishers under the circumstances of this case, AAP submits that First Amendment considerations preclude such a result. While this Court has never, so far as AAP is aware, had occasion to consider the impact of the First Amendment upon the issue of *in personam* jurisdiction over out-of-state publishers in connection with libel actions,[8] a number of lower courts properly have concluded that the "minimum contacts" threshold necessary to satisfy due process requirements is higher in connection with such actions than in other, run-of-the-mill tort cases. The rationales of those decisions, which underscore the propriety of the conclusion as to the lack of jurisdiction reached by the courts below, and which AAP urges are appropriate for adoption by this Court, are discussed briefly below.

In *New York Times Co.* v. *Connor*, 365 F.2d 567 (5th Cir. 1966), the court, in determining whether due process would permit the exercise of jurisdiction in a libel suit against an out-of-state publisher, concluded that "First

8. This issue has, however, been squarely presented to the Court in *Calder* v. *Jones*, No. 82-1401, *appeal docketed* February 22, 1983, in the context of the State of California's assertion of personal jurisdiction over nonresident employees of the publisher defendant. AAP has filed an *amicus* brief in that case as well, urging the Court to give due regard to First Amendment considerations arising out of such jurisdictional issues.

Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity." 365 F.2d at 572.[9] The court there expressed concern over the potential inhibiting effects on the publishing process were such a rule not invoked. It recognized that a publisher might well discontinue distribution of its works in a state where the size of its circulation did not warrant the danger of exposure to liability for libel. The court concluded that a publisher's decision not to publish in such states would impermissibly deprive state residents who wished to read the publication of the opportunity to avail themselves of the publisher's works.[10]

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9. The court cited for support *Walker* v. *Savell*, 335 F.2d 536, 544 (5th Cir. 1964), in which it had declined to confer jurisdiction over an out-of-state publisher "because of the inherent danger or threat to the free exercise of the right of freedom of the press if jurisdiction in every state can be inferred from minimal contacts."

10. For other cases that also have held, in libel actions involving nonresident publishers, that First Amendment considerations are relevant to the determination of whether due process requirements have been met, see *Cox Enterprises, Inc.* v. *Holt*, 678 F.2d 936, 937-38, *reh'g granted on other grounds*, 691 F.2d 989 (11th Cir. 1982) ("federal jurisdiction is subject to First Amendment considerations when a nonresident publisher is sued for libel"); *Edwards* v. *Associated Press*, 512 F.2d 258, 266 (5th Cir. 1975) ("When a court attempts to assess whether jurisdiction over a defendant is reasonable, First Amendment considerations are a significant factor to be weighed"); *Curtis Publishing Co.* v. *Golino*, 383 F.2d 586, 592 (5th Cir. 1967) ("first amendment considerations are a factor relevant to a determination of the jurisdictional question"); *Gonzales* v. *Atlanta Constitution*, 4 Med. L. Rptr. 2146, 2148 (N.D. Ill. 1979); *Johnston* v. *Time, Inc.*, 321 F. Supp. 837, 845-47 (M.D.N.C. 1970), *aff'd in part and vacated in part on other grounds*, 448 F.2d 378 (4th Cir. 1971); *cf. Buckley* v. *New York Post Corp.*, 373 F.2d 175, 183-84 (2d Cir. 1967) ("the First Amendment could be regarded as giving *forum non conveniens* special dimensions and constitutional stature in actions for defamation against publishers and broadcasters").

Since *Connor*, other court decisions have, in similar fact settings, likewise recognized that First Amendment considerations require a showing of more substantial contacts with the jurisdiction than otherwise would be required. *See Edwards* v. *Associated Press*, 512 F.2d 258, 266 (5th Cir. 1975) ("we have woven, in regard to entities clothed with First Amendment protections, a tighter due process net around state power than is true with regard to other entities"); *McCabe* v. *Jenkins and Associates, Inc.*, 531 F. Supp. 648, 654 (E.D. Pa. 1982) ("Courts confronted with this inherent tension between the first and fourteenth amendments to the Constitution have generally required a more substantial presence within the forum state in order to sustain *in personam* jurisdiction over publishers").

The court in *McCabe*, declining to permit a Pennsylvania resident to sue a California-based magazine publisher in Pennsylvania for defamation and invasion of privacy arising out of its publication of plaintiff's photograph, articulated the relevant First Amendment considerations as follows:

> The chilling effect that imposition of jurisdiction over any publisher would have on the free exercise of first amendment rights mandates a subtly different due process analysis. If a publisher stands in peril of being haled into court in any jurisdiction simply because a citizen of that jurisdiction came into possession of one of its publications, no speech would be disseminated beyond the territory in which the speaker can afford to litigate. Thus, if courts freely found *in personam* jurisdiction over publishers of first amendment articles under the same standards imposed on commercial entities, the citizens of each state would soon find themselves with access only to those publica-

> tions with in-state revenues sufficiently high to justify the cost of litigation within that particular jurisdiction. In short, the legendary "free marketplace of ideas," a cornerstone of our constitutional scheme, would be transformed into a marketplace of ideas limited to those who can afford the cost of litigation in that particular marketplace.

Id.[11]

A fortiori, the First Amendment must act to bar a nonresident plaintiff's claim against a nonresident publisher with only the slightest contacts with the forum state.[12] Because a nonresident plaintiff generally has no reputation to protect outside the state of his residence, and because litigating in a remote and inconvenient forum where circulation is *de minimis* is fundamentally unfair to the publisher, the exercise of personal jurisdiction in such cases must be viewed as totally inappropriate.

B. A reversal of the decision below would have a serious impact on the important First Amendment functions performed by publishers

Libel suits by their very nature generally arise out of particularly provocative statements—exposes, articles or books that disclose facts or express opinions about individuals involved in activities in which the public has a legit-

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11. For other cases denying jurisdiction even where suit was commenced by a resident plaintiff see *Cox Enterprises, Inc.* v. *Holt*, 678 F.2d 936 (11th Cir. 1982); *Bradlee Management Services, Inc.* v. *Cassells*, 249 Ga. 717, 292 S.E.2d 717 (1982); *Gonzales* v. *Atlanta Constitution*, 4 Med. L. Rptr. 2146 (N.D. Ill. 1979); *McBride* v. *Owens*, 454 F. Supp. 731, 735 (S.D. Tex. 1978).

12. *See Margoles* v. *Johns*, 333 F. Supp. 942 (D.D.C. 1971), *aff'd*, 483 F.2d 1212 (D.C. Cir. 1973); *cf. Curtis Publishing Co.* v. *Birdsong*, 360 F.2d 344 (5th Cir. 1966).

imate interest. Those publishers bold enough, for example, to accuse public officials of misconduct, disclose irregularities in the operation of a business, criticize a prominent individual or establishment or satirize an event—in short, to heighten public awareness, stimulate public debate, and test conventional wisdom—also are the publishers most threatened by libel suits. The easier it becomes for potential plaintiffs to commence libel actions, subject publishers to the costs and burdens of litigation, and expose publishers to claims for often enormous compensatory and punitive damages awards, the more likely it is that such publishers will draw back from their vital roles, in favor of conservative editorial policies and bland editorial content.

Publishers are already saddled with the burden of being required to defend libel actions in jurisdictions in which they may, from the substantiality of their actiivties, have some reason to expect they may be sued. To sanction lawsuits against publishers in jurisdictions—often far removed from the situs of the publishers' principal activities—having the most tenuous relationship to them would create constitutionally intolerable burdens.

To the extent that a potential plaintiff is permitted freely to forum shop without regard to a "rational nexus" (7a) between the chosen forum, the activities of the publisher and the claimed injury, publishers will surely become less willing to take on the risk of litigation arising out of the creation of hard-hitting commentary and its broad dissemination. As this Court noted in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. at 297:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will

> find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. *See Kulko* v. *California Superior Court, supra,* at 97-98; *Shaffer* v. *Heitner,* 433 U.S., at 216; and see *id.* at 217-219 (Stevens, J., concurring in judgment). The Due Process Clause, by ensuring the "orderly administration of the laws," *International Shoe Co.* v. *Washington,* 326 U.S., at 319, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

This effect will be even more pronounced for smaller and regional publishers with even fewer expectations of, and less ability to defend, suits in forums with which they have virtually no contacts. *See Curtis Publishing Co.* v. *Golino,* 383 F.2d 586, 592 n.13 (5th Cir. 1967).

Petitioner Keeton's simplistic response to the foregoing concerns is that distribution of Hustler magazine into New Hampshire was deliberate, as opposed to accidental, and that if respondent wants to avoid liability for libel in New Hampshire, it need only sever its connection with that state by ceasing to distribute there (Brief for Petitioner at 13). This argument is untenable, however, because it misconceives the nature of the publishing business and the goals sought to be fostered by the First Amendment. Unlike, for example, an automobile manufacturer, who might feasibly sever its connection with states in which it derives little revenue without working great injury to its business, *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. at 297, a publisher faced with a similar choice would be re-

quired to deny to the public "the circulation of information to which [it] is entitled" by virtue of the First Amendment's guarantees. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936).

Petitioner's argument is further belied by the nature of the distribution process for many book publishers' works. Often, the publisher exercises no control over the locale of distribution of particular works after initial sale to its distributors. This being so as to such works, the publisher cannot simply stop selling in particular jurisdictions where it may not wish to take the risk of being sued. Its only recourse would be to refrain from creating the controversial material at all—a result wholly at odds with the goals of the First Amendment.

The facts of this case dramatically underscore the potential for abuse inherent in allowing libel plaintiffs to "hale" publishers into remote jurisdictions. Petitioner Keeton's motives in selecting New Hampshire were plain: she wished to benefit from the state's atypically liberal, six-year statute of limitations for libel actions. (13a, 18a) As noted in the Appendix to this brief, most states have exhibited special solicitude towards publishers and the First Amendment considerations surrounding libel suits by enacting short—typically one- or two-year—statutes of limitations governing such actions. Had the court of appeals permitted Keeton's suit to proceed, it would, as it recognized, in effect have legislated a nationwide six-year statute for libel actions—thereby completely undermining the

strong policies of New Hampshire's sister states.[13] Such a result would clearly contravene both this Court's due process pronouncements, *World-Wide Volkswagen*, 444 U.S. at 291-92, and the appropriate deference to be given to overriding First Amendment principles.

Finally to be noted are the especially harsh consequences for book publishers were the decision below to be overturned. Unlike more ephemeral publications—such as newspapers—books enjoy a degree of permanency that makes their publishers particularly susceptible to long statutes of limitations. While the risk that a topical article in a daily newspaper might be sued upon some period of years after its publication will generally be slight, the same cannot be said of a book of continuing relevance found in community libraries and bookstores. To reverse the decision below and thereby effectively subject book publishers to the longest libel statute of limitations of the 50 states —even where their contacts with that state may otherwise be minimal—would be to deprive publishers of the protection which they so critically need against "lawsuits so long delayed." (18a)

13. A decision which permits a libel plaintiff to shop for a forum with a favorable statute of limitations may also enable that plaintiff to go forum-shopping for a favorable body of substantive law. Petitioner summarily dismisses this concern, arguing (without citation to a single authority) that a decision in her favor will not "subject defendants like Hustler to unpredictable and inconsistent results, for choice of law principles will uniformly select the appropriate substantive law to be applied, regardless of the situs of the litigation." (Brief for Petitioner at 14) But this facile assumption is far from clear. *See, e.g., Fleury* v. *Harper & Row Publishers, Inc.*, 698 F.2d 1022, 1025 (9th Cir. 1983): "Libel and invasion of privacy are transitory torts to which the law of the forum will normally be applied absent a strong governmental interest of another jurisdiction."

Conclusion

The court below, properly applying this Court's due process standards, correctly determined that petitioner Keeton could not maintain her libel suit against respondent publishers in the State of New Hampshire. The special nature of the publishing business, performing as it does essential First Amendment functions, reinforces the correctness of that conclusion.

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APPENDIX

State Statutes of Limitations Governing Libel Actions

One Year or Less

Alabama, ALA. CODE § 6-2-39(4) (1975)
Arizona, ARIZ. REV. STAT. ANN. § 12-541(1) (1981)
California, CAL. CIV. PROC. CODE § 340(3) (West 1982)
Colorado, COLO. REV. STAT. § 13-80-102 (1973)
District of Columbia, D.C. CODE § 12-301(4) (1981)
Georgia, GA. CODE ANN. § 9-3-33 (1982)
Illinois, ILL. REV. STAT. ch. 110 § 13-201 (1979)
Kansas, KAN. STAT. ANN. § 60-514 (1976)
Kentucky, KY. REV. STAT. ANN. § 413.140 (Supp. 1982)
Louisiana, LA. CIV. CODE ANN. art. 3536 (West 1953)
Maryland, MD. CTS. & JUD. PROC. CODE ANN. § 5-105 (1980 Repl. Vol.)
Michigan, MICH. COMP. LAWS ANN. § 600.5805(6) (Supp. 1983)
Mississippi, MISS. CODE ANN. § 15-1-35 (1972)
Nebraska, NEB. REV. STAT. § 25-208 (Reissue 1979)
New Jersey, N.J. STAT. ANN. § 2A:14-3 (West 1952)
New York, N.Y. CIV. PRAC. LAW § 215 subd. 3 (McKinney 1972 and Supp. 1983)
North Carolina, N.C. GEN. STAT. § 1-54 (1969 Repl. Vol.)
Ohio, OHIO REV. CODE ANN. § 2.305.11 (Page 1981)
Oklahoma, OKLA. STAT. tit. 12 § 95 (1981)
Oregon, OR. REV. STAT. § 12.120(2) (1981 Repl. Vol.)
Pennsylvania, 42 PA. CONS. STAT. ANN. § 5523(1) (Purdon 1981)
Rhode Island, R.I. GEN. LAWS § 9-1-14 (1956)
Tennessee, TENN. CODE ANN. § 28-3-103 (1956) [6 mo.]
Texas, TEX. REV. CIV. STAT. ANN. art. 5524 (Vernon 1958 and Supp. 1983)
Utah, UTAH CODE ANN. § 78-12-29 (1953)
Virginia, VA. CODE ANN. § 8.01-248 (1977 Repl. Vol.)
West Virginia, W.VA. CODE § 55-2-12(c) (Supp. 1982)
Wyoming, WYO. STAT. § 1-3-105(a)(v)(a) (1977)

Two Years

Alaska, ALASKA STAT. § 09-10.070 (1973)
Connecticut, CONN. GEN. STAT. ANN. § 52-597 (West 1960 and Supp. 1982)
Delaware, DEL. CODE ANN. tit. 10 § 8119 (1974 Rev.)
Hawaii, HAWAII REV. STAT. § 657-4 (1976 Repl. Vol.)
Idaho, IDAHO CODE § 5-219 (1947)
Indiana, IND. CODE § 34-1-2-2 (1976)
Iowa, IOWA CODE ANN. § 614.1 (West Supp. 1983)
Maine, ME. REV. STAT. ANN. tit. 14 § 753 (1964)
Minnesota, MINN. STAT. § 541.07 (1982)
Missouri, MO. REV. STAT. § 516.140 (1978)
Montana, MONT. CODE ANN. tit. 27 ch. 2 § 204 (1981)
Nevada, NEV. REV. STAT. § 11.190(4)(c) (1981)
North Dakota, N.D. CENT. CODE § 28-01-18 (Supp. 1981)
South Carolina, S.C. CODE § 15-3-550 (1976)
South Dakota, S.D. COMP. LAWS ANN. tit. 15 ch. 2 § 15 (1967 and Supp. 1982)
Washington, WASH. REV. CODE § 4.16.100 (1976)
Wisconsin, WISC. STAT. § 893.57 (1979-80)

Three Years

Arkansas, ARK. STAT. ANN. § 37-206 (Repl. 1962)
Massachusetts, MASS. GEN. LAWS ANN. ch. 260 § 4 (West 1983)
New Hampshire (actions accrued after Aug. 28, 1981), N.H. REV. STAT. ANN. § 508:4, II (Supp. 1981)
Vermont, VT. STAT. ANN. tit. 12 § 512 (1973 and Supp. 1982)

Four Years

Florida, FLA. STAT. § 95.11(3)(o) (1981)
New Mexico, N.M. STAT. ANN. § 37-1-4 (1978)

Six Years

New Hampshire (actions accrued prior to Aug. 28, 1981), N.H. REV. STAT. ANN. § 508:4, II (Supp. 1981)

MOTION FILED
JUN 29 1983

No. 82-485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KATHY KEETON,

Petitioner,

—against—

HUSTLER MAGAZINE, INC., LARRY FLYNT, LFP, INC., and L.F.P., INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF CBS INC., DOW JONES & COMPANY, INC., THE HEARST CORPORATION, THE MAGAZINE PUBLISHERS ASSOCIATION, THE MIAMI HERALD PUBLISHING COMPANY, NEWSWEEK, INC., THE NEW YORK TIMES COMPANY, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SIGMA DELTA CHI, TIME, INC. and TRIBUNE COMPANY

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1. Pursuant to Rule 36.3 and Rule 42 of the Rules of this Court, CBS Inc., Dow Jones & Company, Inc., The Hearst Corporation, The Magazine Publishers Association, The Miami Herald Publishing Company, Newsweek, Inc., The New York Times Company, The Reporters Committee for Freedom of the Press, Sigma Delta Chi, Time, Inc., and Tribune

Company respectfully move this Court for leave to file a brief *amicus curiae* in the above-captioned case.

2. Movants include publishers of major newspapers and magazines, and owners of major radio and television networks, involved in communication of news, information, and opinion to the American public. Each of the movants is more fully described in Appendix A annexed hereto.

3. The question presented in this case is a matter of continuing and critical importance to movants. Because their publications circulate throughout the country, movants will be directly affected by this Court's resolution of the question of personal jurisdiction now before it.

4. For the reasons stated above, as well as those set forth in the attached brief *amicus curiae*, movants respectfully request this opportunity to present their views on the instant case to this Court and respectfully request this Court to grant their motion for leave to file the accompanying brief *amicus curiae* urging affirmance of the opinion of the court below.

Dated: New York, New York
June 27, 1983

Respectfully submitted,

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This brief, *amicus curiae*, is respectfully submitted pursuant to Rule 36 of the Rules of this Court, urging affirmance of the decision below of the United States Court of Appeals for the First Circuit, on the ground that personal jurisdiction may not be asserted over the out-of-state defendants consistent with the Due Process clause of the Fourteenth Amendment to the United States Constitution.

INTEREST OF AMICI

Amici include publishers of major newspapers and magazines, and owners of major radio and television stations, involved in communication of news, information and opinion to the American public.[1] Some of their publications are national; some are distributed primarily—but not exclusively—in one metropolitan area. In all cases, their circulation goes beyond the borders of any one state. Some of their publications have circulations in the millions of copies; some in the thousands. As major publishers involved in the dissemination of news and opinions, *amici* play an important role in informing the American people on matters vital to their well-being and self-government.

Because their publications circulate throughout the country, *amici* will be directly affected by this Court's resolution of the question of personal jurisdiction now before it. The jurisdictional rule that petitioner proposes to this Court would expose *amici* to suit in every state in which they enjoy anything more than *de minimis* circulation, even though the state may have little or no connection with the plaintiff's cause of action. Such a rule would enable libel plaintiffs to shop for the forum with rules of law and procedure and with local biases most favorable to them, and thus use jurisdictional gamesmanship to gain an unjustified advantage over publisher defendants.

Amici urge that allowing jurisdiction based on circulation alone—in the absence of a more concrete connection between the forum, the defendant and the controversy—would unreasonably and unfairly burden their ability to conduct their businesses, thereby frustrating fundamental social policies of

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1 *Amici* include CBS Inc., Dow Jones & Company, Inc., The Hearst Corporation, The Magazine Publishers Association, The Miami Herald Publishing Company, Newsweek, Inc., The New York Times Company, The Reporters Committee for Freedom of the Press, Sigma Delta Chi, Time, Inc., and Tribune Company. Each of the *amici* is more fully described in Appendix A to this brief.

states more directly interested in *amici* and the controversies in which they may become involved. *Amici* therefore respectfully submit this brief to urge this Court to repudiate any suggestion that long-arm jurisdiction can be premised on nothing more than circulation of an allegedly libelous publication in a forum.

SUMMARY OF ARGUMENT

The "minimum contacts" test set forth in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and its progeny calls for the weighing of various factors to determine whether a state's assertion of jurisdictional power would be both fair to an out-of-state defendant and consistent with concepts of shared state sovereignty embodied in our federal system. Because of the variables to be considered, as well as the inevitable diversity of the factual settings in which they must be applied, this inquiry is one "in which few answers will be written 'in black and white.' " *Kulko* v. *Superior Court of California*, 436 U.S. 84, 92 (1978) (quoting *Estin* v. *Estin*, 334 U.S. 541, 545 [1948]).

Although the contours of long-arm jurisdiction are usually not susceptible of clear delineation, the case at bar presents this Court with a unique occasion to address, and repudiate, a theory of jurisdiction that falls well beyond the pale. Petitioner claims that, despite the complete absence of any other connection between the defendants' in-state activities and her cause of action and between the forum and the cause of action, the in-state circulation alone of the allegedly defamatory publication is a sufficient basis for New Hampshire to exercise its long-arm jurisdiction. When " 'traditional notions of fair play and substantial justice,' " *International Shoe, supra*, 326 U.S. at 316 (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463 [1940]), are applied to the particular tort of defamation, with its unusual capacity for causing injury diffused among the fifty states, and when those values are considered "in the context of our federal system of government," *International Shoe, supra*,

326 U.S. at 317, petitioner's claim to jurisdiction emerges as a clear affront to Due Process.[2]

In a state whose only tie to the cause of action is in-state circulation—a state where neither the plaintiff nor the defendant resides and where the plaintiff is largely unknown—the local circulation of the defendant's publication will have only a minimal, often pretextual, connection with plaintiff's cause of action. In such a state, the forum will have nothing more than an undifferentiated and insubstantial interest in adjudicating the controversy. Because of its tenuous relationship to the controversy, application of the forum's choice of law principles, procedural rules and community standards will not fairly be entitled to deference by other states with a greater and more direct interest in the action. Moreover, because the plaintiff will be largely unknown in the forum, the publisher could not reasonably have anticipated that the publication, if libelous, would cause any particularized harm to plaintiff's reputation in the state and so conformed the publication to the standards of the state.

Repudiation of petitioner's theory would work no hardship upon libel plaintiffs. Provided that minimum contacts standards are otherwise satisfied, a libel plaintiff would have ample opportunity to invoke long-arm jurisdiction in a state with a legitimate interest in the cause of action, typically the plaintiff's state of residence.[3] But when a libel plaintiff travels to an essentially uninterested state to sue a publisher based on nothing more than the defendant's circulation in that state and the plaintiff's desire to achieve some tactical advantage, Due Process protects the publisher from being subjected to long-arm jurisdiction.

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2 Since in-state circulation is the only contact asserted in the case at bar as a basis for long-arm jurisdiction, *amici* do not address in this brief the question of what impact other contacts within a forum, such as local newsgathering activities, might have on a jurisdictional analysis.

3 In all cases, of course, the plaintiff will also have the option of suit in those states where the publisher's presence is such that resort to long-arm jurisdiction is unnecessary.

ARGUMENT

IN DEFAMATION ACTIONS, WHERE THE ONLY CONTACT BETWEEN THE DEFENDANT, THE CAUSE OF ACTION AND THE FORUM IS IN-STATE CIRCULATION, DUE PROCESS BARS THE ASSERTION OF LONG-ARM JURISDICTION

This Court has applied the Due Process requirements initially established in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), in a variety of factual settings. For the first time in this case, it is called upon to do so in a defamation action.

The basic analytic structure is well established. Due Process requires that an exercise of jurisdiction over an out-of-state defendant be fair, reasonable and consistent with the forum state's status as a co-equal sovereign in our federal system. *World-Wide Volkswagen* v. *Woodson*, 444 U.S. 286, 292 (1980). Essential to an application of the *International Shoe* standard is a determination whether the connection between the foreign forum, the defendant's in-state activities and the particular cause of action is sufficient to make it fair and reasonable to require the defendant to defend the particular cause of action in the forum state. *Rush* v. *Savchuk*, 444 U.S. 320 (1980); *Kulko* v. *Superior Court of California*, 436 U.S. 84 (1978).

Due Process also requires consideration of a variety of equitable factors in evaluating the propriety of haling an out-of-state defendant into a remote court:

> "[T]he burden on the defendant . . .; the forum State's interest in adjudicating the dispute . . .; the plaintiff's interest in obtaining convenient and effective relief . . .; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental social policies . . . ."

World-Wide Volkswagen v. *Woodson, supra*, 444 U.S. at 292.

The proposition advanced by petitioner in support of her claim of jurisdiction may be succinctly stated: To establish long-arm jurisdiction in a libel action the *only* connection between the forum, the defendant and the cause of action that a libel plaintiff need show is circulation of the defendant's allegedly libelous publication in the forum state. In the context of a suit against a nationally circulated publication, this contention translates into the assertion that whatever the locus of the plaintiff, the defendant and the claimed injury, all fifty states (and the District of Columbia) may exercise long-arm jurisdiction for all alleged libels and that libel plaintiffs—no matter where they and their reputations may be—have an unfettered choice as to where they may bring suit.

Petitioner is relegated to this sweeping argument in the case at bar by the total absence of contacts, other than circulation of defendants' publication, between defendants, petitioner's cause of action and her chosen forum, New Hampshire. In the District Court she failed completely to point to *any* activity by defendants, other than circulation, in the forum.[4] She was also unable to demonstrate that she had *any* reputation in the forum that could possibly have been injured by circulation there of the alleged libel.

Indeed, the District Court, after noting that petitioner, as the plaintiff below, had the burden of alleging and proving facts to support personal jurisdiction, *see McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936), found that her only claim to any reputation in New Hampshire was the inclusion of her name in a "litany of unknowns" on the masthead of a magazine circulated in the state. In the absence of anything else to suggest that petitioner had any reputation in New Hampshire, the District Court expressly found that she had failed to set forth "any factors which make her anything other than a stranger to the state . . ." and concluded that she

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4 And even that circulation is less than one percent of Hustler's national circulation. Joint Appendix at 43a.

had no "reputation or image of any kind in New Hampshire." Appendix to Petition for Certiorari at 7a.[5]

Petitioner's claim to jurisdiction distorts Due Process standards by avoiding what *International Shoe* requires, namely, an evaluation of the relationship between the plaintiff's cause of action and the defendant's in-state contacts and an assessment of the nexus between the claim and the forum state. It likewise ignores a proper balancing of the other relevant factors outlined in *World-Wide Volkswagen*. Established Due Process analysis leads to the conclusion that, as a matter of fundamental fairness, circulation *alone* does not provide a sufficient basis for long-arm jurisdiction.

A. Circulation Alone Does Not Provide a Sufficient Connection Between the Cause of Action and the Defendant's In-State Activities to Support Long-arm Jurisdiction

Consideration of the connection between the nature and quantity of a defendant's in-state activities and the plaintiff's cause of action is a vital part of the Due Process calculus required by *International Shoe's* "minimum contacts" analysis. *See World-Wide Volkswagen, supra*, 444 U.S. at 295. Absent in-state activities by the defendant that are truly pervasive, Due Process generally allows a non-resident defendant to be called upon to defend in the forum only those claims that arise from the defendant's in-state activities. *See* Von Mehren

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5 Although the Court of Appeals did not quote the District Court's language in its own statement of the facts, 682 F.2d at 33-34, and in fact assumed for purposes of its discussion that petitioner had a *de minimis* in-state reputation, the District Court's factual findings were not questioned—let alone overturned—by the Court of Appeals, and their propriety is not in issue here. These circumstances, and the importance in this case of petitioner's absence of local reputation, makes this case a particularly appropriate one for application of "the salutary principle that great weight should be accorded findings made by district courts in cases turning on peculiarly local conditions and circumstances." *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 621 n.20 (1974).

and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966). As this Court observed in *International Shoe*:

> "[S]o far as th[e] obligations [sued on] arise out of or are connected with the [defendant's] activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."

326 U.S. at 319.

Thus, where a libel plaintiff sues in his or her home state and attempts to premise long-arm jurisdiction on the defendant publisher's circulation in that state, there will generally be a strong connection between the defendant's in-state activities—circulation—and the plaintiff's cause of action—a claim for redress for injuries allegedly arising from that circulation. The plaintiff must, of course, seek in that one action recovery for damages suffered in *all* states,[6] but the principal damage to

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6 This is because of the so-called single publication rule. *See, e.g., Patch* v. *Playboy Enterprises, Inc.*, 652 F.2d 754, 757 (8th Cir. 1981). The single publication rule evolved to replace the ancient multiple publication rule, under which each delivery of each copy of printed matter constituted a separate tort, and accordingly gave rise to a separate cause of action. *Duke of Brunswick* v. *Harmer*, 117 Eng. Rep. 75 (Q.B. 1849); *see generally*, Prosser, *Interstate Publication*, 51 Mich. L. Rev. 959 (1953).

The multiplicity of possible actions under the multiple publication rule has long been seen, in most jurisdictions, as an offense to judicial administration and an undue burden on libel defendants. Most pointedly, its effect was to resurrect causes of action for even very old utterances whenever by happenstance a copy changed hands—thus effectively depriving publishers of all benefits of statutes of limitations. *Gregoire* v. *G.P. Putnam & Sons*, 298 N.Y. 119, 123, 81 N.E.2d 45, 47 (1948). The single publication rule now used by a majority of states holds instead that dissemination of all copies of a single writing, such as an issue of a book or newspaper, constitutes a single publication and gives rise to but one cause of action. Restatement (Second) Torts § 577A(3), (4) (1977); Uniform Single Publication Act, § 2.

reputation will usually have been caused in the state in which the suit is being pressed, where the plaintiff will be most intimately known.[7] So long as *International Shoe's* "minimum contacts" standard is met,[8] Due Process generally is not offended when the publisher is forced to defend its publication in the plaintiff's home state.

The situation is different, however, when a libel plaintiff seeks to sue a publisher defendant in a state that is foreign to both plaintiff and defendant and where the plaintiff has no substantial reputation. In such a case, the alleged injury caused by the circulation in the forum state will have at most a minimal relation to the greater harm caused by circulation in other states where the plaintiff is better known. The plaintiff will thus seek to rely on an insubstantial in-state injury as the ostensible basis for jurisdiction, while simultaneously seeking damages principally for harm caused elsewhere.

The case at bar presents an egregious example of a plaintiff's reliance on an alleged *de minimis* in-state injury as the basis for claiming jurisdiction over a far larger out-of-state claim of injury. In light of the District Court's unchallenged findings that petitioner is "a stranger" to New Hampshire and has no "reputation or image of any kind" in the state, Appendix to Petition for Certiorari at 7a, it can hardly be argued that the New Hampshire circulation of defendants' magazine was a cause of any significant portion of the $40 million that peti-

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7 As the Restatement (Second) of Conflicts recognizes, "the state where the plaintiff has suffered the greatest injury by reason of his loss of reputation . . . will usually be the state of the plaintiff's domicile. . . ." Restatement (Second) Conflict of Laws, § 150, Comment e, p. 459 (1971).

8 *Cf. McCabe* v. *Kevin Jenkins & Associates, Inc.*, 531 F. Supp. 648 (E.D. Pa. 1982) (circulation of California-based publication to six subscribers in Pennsylvania held to be an insufficient basis for asserting long-arm jurisdiction in libel action by Pennsylvania residents).

tioner seeks for alleged damage to her reputation where she is actually known. Rather, the circulation in New Hampshire upon which petitioner relies is essentially irrelevant to petitioner's claim. It is a jurisdictional pretext.

B. Circulation Alone Does Not Provide a Sufficient Connection Between the Cause of Action and the Forum State to Support Long-Arm Jurisdiction

When a libel plaintiff relies only on in-state circulation of a publication to connect his or her claim to the forum, not only is there an insufficient connection between the defendant's in-state activities and the cause of action, but the nexus between the forum and the lawsuit is also too insignificant to support long-arm jurisdiction. If an allegedly libelous publication is circulated in 50 states, the mere fact that the plaintiff has elected to bring suit in one of them provides no reason why the defendant should be compelled to travel to that particular state to defend the action and in no meaningful way distinguishes the forum from any other state. At the same time, such a forum has no legitimate interest in adjudicating a dispute between an out-of-state plaintiff and an out-of-state defendant over an alleged libel that principally—or entirely—caused injury elsewhere.

As this Court emphasized in *Rush* v. *Savchuk, supra,* "[i]t is apparent that such a 'contact' "—that is, one diffused throughout all American jurisdictions—"can have no jurisdictional significance." 444 U.S. at 330. Petitioner in the case at bar has shown nothing more than such a diffused connection between the forum and her claim. She has provided no reason why New Hampshire, any more than Alaska, Arizona or Arkansas, is an appropriate forum for her case.

In fact, New Hampshire has no interest in this controversy. A state has a legitimate interest, of course, in providing a forum for its residents. A state's "manifest interest in providing effective means of redress for its residents . . ." may be the pivotal factor in assessing the propriety of jurisdiction.

McGee v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957).[9] For this reason, the lower court decisions that have upheld personal jurisdiction over non-resident publishers in favor of resident plaintiffs have done so explicitly to permit the litigation to proceed in the most interested forum, convenient for the stay-at-home plaintiff.[10]

Where, as here, a plaintiff chooses to leave his or her home state to sue elsewhere, however, no such state interest is present. To the contrary, in such cases the plaintiff has made the deliberate decision to forego the protections of his or her state's courts and to impose the costs of distant litigation upon him- or herself. In so doing, however, such a plaintiff imposes on the courts and juries of a foreign state the burden of adjudicating a dispute in which that state may have little or no interest.[11]

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9 *See also Roy* v. *North American Newspaper Alliance, Inc.*, 106 N.H. 92, 205 A.2d 844, 845, 847 (1964) (emphasizing New Hampshire's interest in protecting its own citizens from being defamed). *Cf. Kulko* v. *Superior Court of California*, 436 U.S. 84, 92 (1978); *Shaffer* v. *Heitner*, 433 U.S. 186, 208 (1977).

10 *E.g., Anselmi* v. *Denver Post*, 552 F.2d 316, 321 (10th Cir.), *cert. denied*, 432 U.S. 911 (1977); *Buckley* v. *New York Post Corp.*, 373 F.2d 175, 180 (2d Cir. 1967). *Compare Curtis Publishing Co.* v. *Birdsong*, 360 F.2d 344 (5th Cir. 1966) (holding against personal jurisdiction over a non-resident publisher despite in-state circulation, where the plaintiff was also a non-resident).

11 If plaintiffs could bring libel actions anywhere, the burden of adjudicating extraneous claims could fall with particular force upon states that have rules or statutes favoring libel plaintiffs. Thus, for example, a state that chose to enact a long limitations statute would risk having its courts flooded with claims that had expired elsewhere. A forum state's interest in avoiding added burdens on what may be an already over-crowded judicial system, while still preserving that system's efficacy and favorable rules in cases with a more direct connection to the state and its residents, suggest that states may have a greater interest in avoiding extraneous claims than in adjudicating them. *See Sosna* v. *Iowa*, 419 U.S. 393, 407 (1975). *Cf. Douglas* v. *New York, New Haven, and Hartford Railroad*, 279 U.S. 377, 387 (1929).

Absent a state interest in providing a forum for its residents, a state seeking to assert long-arm jurisdiction over a remote publisher must ground its claim to jurisdiction in the state's interest in the tort itself. "The legitimate state interest" that underlies the law of libel, and that justifies limited intrusion on freedom of expression, is compensation for wrongful injury to reputation. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). *See New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). Although this is a "strong and legitimate interest," *Gertz, supra*, 418 U.S. at 348, it follows that a state has no strong, legitimate or even identifiable interest to vindicate where little or no injury to the reputation of a non-resident has been suffered within its borders and where the principal injury to reputation has occurred elsewhere. *See id.*, 418 U.S. at 349. To the contrary, assertion of state jurisdiction in such a case is little more than "officious intermeddling in matters in which another state has a paramount interest." *Sosna* v. *Iowa*, 419 U.S. 393, 407 (1975).

Since, as the District Court found, petitioner is not a New Hampshire resident and has no claim to reputation in New Hampshire, that state obviously has no interest in protecting petitioner's reputation. But even if, contrary to the District Court's findings, the inclusion of petitioner's name in a laundry list of names on a magazine masthead gave her some local reputation in her chosen forum, the forum's interest, if any, in protecting this tenuous in-state reputation would be shared with every other state and would hardly be sufficient to justify forcing the defendant publisher to defend in New Hampshire.[12]

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12 There is no other legitimate state interest in the law of defamation. In cases involving out-of-state plaintiffs, some courts have posited (and then discounted) a state interest in "protect[ing] its citizens against reading libels . . . about persons not present in th[e] state." *Curtis Publishing Co.* v. *Birdsong*, 360 F.2d 344, 347 (5th Cir. 1966). *See also, Keeton* v. *Hustler Magazine, Inc.*, 682 F.2d at 34; Comment, *Long-Arm Jurisdiction Over Publishers: To Chill A Mocking Word*, 67 Col. L. Rev. 342, 350 (1967). But even hypothesizing such an interest goes too far. The First Amendment places any "interest in

C. Long-Arm Jurisdiction Based Upon Circulation Alone Would Thwart the Shared Interests of the Several States in Furthering Fundamental Substantive Social Policies

A rule allowing jurisdiction based upon mere circulation would allow a relatively uninterested state to override the substantive policies of its sister states. If libel plaintiffs were given free rein to bring suit anywhere, they naturally would be encouraged to bring suit in states where they perceived the procedures, choice of law rules or juries to be particularly favorable to them, even if those states had no relation to their causes of action. *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 250 (1981). For publications with nationwide circulation, the result would be to nationalize the law of those jurisdictions least favorable to the press. A state with only a negligible interest in a controversy could apply an aberrant rule of law and thereby thwart the considered judgments made by the legislatures of states with an immediate concern with the case.

The action at bar amply illustrates these dangers. Although a particular state's statute of limitations is considered a procedural rule, there is a clear consensus among the several states that the statute of limitations for libel should be short. Thus, at last count forty-four states require libel actions to be

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shielding [local] citizens from information about activities outside [a state's] borders" beyond the legitimate reach of state power. *Bigelow* v. *Virginia*, 421 U.S. 809, 827-28 (1975). Moreover, assertion of such an interest would threaten to enmesh a state's courts in the impermissible task of regulating the content of communication without any countervailing concern with protecting the reputation of its subject. *See* L. Tribe, *American Constitutional Law* 641 (1978).

In any event, even assuming that such a state interest were constitutionally cognizable and would not engage the state in impermissible content regulation, such an interest inevitably would be "shared by 49 other states . . ." *Curtis Publishing Co.* v. *Birdsong*, *supra*, 360 F.2d at 347, and could thus provide no reason why jurisdiction in any such uninterested state would be appropriate. *See Rush* v. *Savchuk*, *supra*, 444 U.S. at 330.

brought within one or two years after publication. *See* R. Sack, *Libel, Slander, and Related Problems*, 587 (1980). The predominance of short limitations statutes for libel is a "declaration of [a] public policy governing the right to litigate," *Gregoire* v. *G.P. Putnam & Sons*, 298 N.Y. 119, 125, 81 N.E.2d 45, 48 (1948), that is generally shared by the several states. It reflects their judgment that a potential plaintiff can promptly assess any damage to reputation and their deliberate decision that publishers should be protected from having to defend stale claims. *Id.*, 298 N.Y. at 125-26, 81 N.E.2d at 48-49. When the instant action was begun, New Hampshire was the most conspicuous exception to this consensus. It provided for a six-year statute of limitations.

Petitioner, a New York resident who claims to have been libeled by an Ohio-based publication, waited until after the one-year statutes of limitations applicable in her home state and the defendants' had expired before bringing this action in New Hampshire. She did so because she concluded that New Hampshire was "the only state remaining [in the country] in which the statute of limitations had not run." 682 F.2d at 33. Because New Hampshire courts apparently apply their own state's six-year statute of limitations to all actions commenced in the forum, *id.* at 35, the likely result—if long-arm jurisdiction is upheld—would be that petitioner's claim for damages to her reputation nationwide, which had expired everywhere else, would be revived by the simple mechanism of commencement of suit there.

Obviously, if petitioner's assertion of long-arm jurisdiction were countenanced by this Court, all other similarly stale claims against national publications could be resurrected by the same simple expedient. The practical effect of such a jurisdictional rule would be to obliterate for such publications the statutes of limitations enacted by forty-nine other states and to substitute in their place, as a new "national" limitations statute, the law of that one state whose legislature had decided to enact the longest libel limitations statute.

The results of petitioner's approach would not be limited to nationalizing the statute of limitations for libel. Rather, its forum-shopping opportunities could be multiplied endlessly. Of course, procedural rules, such as statutes of limitations, reporter's shield laws, evidentiary presumptions and rules for jury composition and voting, will ordinarily be those of the forum. Restatement (Second) Conflict of Laws, § 150 (1971). But even as to substantive rules, a suit in a remote jurisdiction dramatically increases the likelihood that the law of that uninterested forum will be applied. New Hampshire, for example, leaves its courts free to apply its own law if they "regard[ ] [it] as the sounder rule of law." *La Bounty* v. *American Insurance Co.*, 451 A.2d 161, 163 (N.H. 1982). Moreover, the already "malleable choice-of-law rules," *Piper Aircraft* v. *Reyno, supra,* 454 U.S. at 252 n. 18, of the fifty states are particularly variable in multi-state defamation actions.[13] And if a *de minimis* in-state injury is held to create a sufficient state interest for the assertion of long-arm jurisdiction, a state could as readily hold the same injury a sufficient basis for application of its own substantive law.[14] *See Allstate Insurance Co.* v. *Hague,* 449 U.S. 302, 312-13 (1981).

Even where libel law has been "constitutionalized," there may be powerful motivations for a plaintiff to go forum

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13 As discussed in Note, *Choice of Law in Multistate Defamation Actions: A Functional Approach,* 77 Harv. L. Rev. 1463 (1965), the problem of choice-of-law in the multi-state defamation context has produced more confusion than clarity, engendering "diverse judicial responses," *id.* at 1463, that include, *inter alia,* the application of the law of (1) each state in which an alleged libel is circulated, (2) the state of principal publication, (3) the state of first publication, (4) the plaintiff's domicile, (5) the state with most significant contacts to the action, (6) the state with greatest interest in the particular issue, or (7) simply of the forum itself.

14 Constitutional limitations on a state's choice of law are so lenient as to afford no sure protection against such results where based on the defendant publisher's in-state circulation. *Allstate Insurance Co.* v. *Hague,* 449 U.S. 302, 312-13 (plurality), 332 (dissent) (1981).

shopping. For example, the several federal circuits now have divergent decisional law on such vital libel elements as the definition of a "public figure"[15] and the availability of the defense of "neutral reportage."[16] Because each federal district court will inevitably follow the law of its circuit on such issues, *e.g.*, *Hasbrouck* v. *Texaco, Inc.*, 663 F.2d 930, 933 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 63 (1982); *see Long* v. *Arcell*, 618 F.2d 1145, 1147 n.2 (5th Cir.), *cert. denied*, 449 U.S. 1083 (1981), the plaintiff would again have an opportunity to select the controlling law.[17]

Finally, petitioner's approach would allow plaintiffs to seek out favorable juries for even dubious claims in states distant from the place of injury to the plaintiff's reputation. Although the essence of the tort of defamation is the damage to one's reputation perceived "by the reading public acquainted with the parties and the subject matter," *November* v. *Time, Inc.*, 13 N.Y.2d 175, 179, 19 N.E.2d 126, 244 N.Y.S.2d 309, 312

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15 *Compare, e.g., Steaks Unlimited, Inc.* v. *Deaner*, 623 F.2d 264, 274 (3d Cir. 1980) (factual showing of plaintiff's "access to channels of effective communication" is an important consideration in finding it to be public figure), *with Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d 583, 589 (1st Cir. 1980) (plaintiff's access to channels of effective communication discounted in public figure inquiry).

16 *Compare Edwards* v. *National Audubon Society*, 556 F.2d 113, 120 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977), *with Dickey* v. *CBS, Inc.*, 583 F.2d 1221, 1225-26 (3d Cir. 1978) *and Dixson* v. *Newsweek*, 562 F.2d 626, 630-31 (10th Cir. 1977).

17 The circuits may also disagree on their construction of a particular state's substantive law. *Compare, Medico* v. *Time, Inc.*, 643 F.2d 134, 146-47 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981) (Pennsylvania law affords privilege to report fairly on official action or proceeding irrespective of whether the reporter actually relied on the official action or proceeding as his source of information), *with Bufalino* v. *Associated Press*, 692 F.2d 266 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3872 (June 6, 1983) (Pennsylvania law confers such a privilege only if the reporter actually derived his information from the official action or proceeding).

(1963), petitioner's rule would allow such decisions to be made by juries familiar with neither. A jury in another part of the country might well consider the defamatory nature of, and damages attributable to, an alleged libel differently from a jury in the community in which a plaintiff resides, and in which harm to his or her reputation could be localized.

Varying local standards and divergence in procedural and substantive rules among the states and federal circuits may, of course, be salutary. *See, e.g., Chandler* v. *Florida,* 449 U.S. 560, 579-80 (1981). But the benefits of the "laboratories" of the many jurisdictions in our federal system are negated by the unlimited forum-shopping opportunities advocated by petitioner here. Under petitioner's approach, there is simply no assurance that divergent local rules will be confined in application to those defamation actions in which the forum has any legitimate interest.

This result would place an undue strain on the federal system. An adverse judgment in New Hampshire is of concern to the defendant publisher here not because its in-state assets can be seized. It has none. Rather, the defendant's potential liability exists because the judgment of a court held to have jurisdiction is constitutionally entitled to Full Faith and Credit elsewhere. *E.g., Nevada* v. *Hall,* 440 U.S. 410, 421 (1979). For this reason, jurisdictional standards must be sufficiently stringent to guarantee that each state laying a claim upon an out-of-state defendant has a legitimate interest in the cause of action, so that its judgment is fairly entitled to deference by the necessarily interested states where the defendant's assets can be found. *See Thomas* v. *Washington Gas Light Co.,* 448 U.S. 261, 272 (1980); *Nevada* v. *Hall, supra,* 440 U.S. at 424 n.24 (1979).

A jurisdictional rule that would allow a state that is essentially uninterested in an action to override the considered judgments of forty-nine other states—in this case that a publisher after a given time is entitled to repose—would feature no such legitimacy. Rather, it would defeat "the shared

interest of the several states in furthering fundamental substantive social policies. . . ." *World-Wide Volkswagen, supra,* 444 U.S. at 292. *See Allstate Insurance Co.* v. *Hague, supra,* 449 U.S. at 308; *Nevada* v. *Hall, supra,* 440 U.S. at 424 n.24. Such a rule would violate the policies implicit in Full Faith and Credit and overstep the limitations on state sovereignty that our federal system imposes on each state in the interests of all.

D. Long-Arm Jurisdiction Based Upon Circulation Alone is Improper in States in Which a Particularized Risk of Injury to Reputation Is Not Reasonably Foreseeable

While the foreseeability of suit in a given forum has played an important part in judicial application of Due Process standards, the foreseeability that is "critical to due process analysis," as this Court emphasized in *World-Wide Volkswagen,* "is not the mere likelihood that a [defendant's] product will find its way into the forum State." 444 U.S. at 297. Instead, it is "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Ibid.*

Underlying petitioner's "circulation-is-sufficient" argument is an implicit suggestion that this Court should transplant to the libel context an approach to foreseeability developed in products liability cases, which allows suit in states into which a manufacturer has directly or indirectly shipped his allegedly defective product. But such an approach is manifestly inapplicable to defamation actions.

In the context of allegedly defective products, a manufacturer who injects his goods into the stream of commerce cannot foresee whom the product might injure if defective. Nor does the product's capacity to injure generally depend on where it is used. Rather, the foreseeable places of injury are coextensive with the places in which the goods are distributed. *See Buckeye Boiler Co.* v. *Superior Court of Los Angeles County,* 71 Cal.2d 893, 80 Cal. Rptr. 113 (1969). In such circumstances, the courts have responded by frequently sustaining jurisdiction over manufacturers based upon in-state

injury in states where they deliberately distribute their products, directly or indirectly. *See, e.g., Buckeye Boiler, supra; Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961). *Cf. World-Wide Volkswagen, supra,* 444 U.S. at 295-98.

This reasoning, however, does not carry over to a libel context. The tort of defamation provides redress for injury, not to unidentifiable consumers, but to the subjects of a publication, who ordinarily will be known to the publisher in advance of publication. If the publisher is aware who the subjects of the publication are, he or she reasonably can anticipate where those subjects may be injured if the publication proves to be false and defamatory. Thus, in contrast to products liability cases, the mere fact of deliberate circulation in a state is not the best measure of whether particularized harm to reputation may foreseeably occur there. Instead, if a publication is capable of causing injury to reputation, it is foreseeable that such injury will be particularized in the home state of the subject of the publication or, at most, in those places where he or she is well known. And it follows that only in those states should a publisher be called to account for that injury.[18]

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18 This focus, for purposes of jurisdiction, on where a publication foreseeably could cause injury is consistent with that adopted by at least three circuit courts of appeal. *See e.g., Church of Scientology* v. *Adams,* 584 F.2d 893, 897-98 (9th Cir. 1978) (holding that jurisdiction was not proper in California where "it was not reasonably foreseeable that any substantial risk of defamation would arise from [the] circulation [of the publications at issue] in that state. . . ."); *Anselmi* v. *Denver Post, Inc.*, 552 F.2d 317, 325 (10th Cir.), *cert. denied,* 432 U.S. 911 (1977) (allowing jurisdiction in Wyoming over a California publisher in action brought by Wyoming residents where "it was foreseeable that [the story] would be given substantial attention within Wyoming" and would have a "substantial effect" there); *Appleyard* v. *Transamerican Press, Inc.*, 539 F.2d 1026, 1029 (4th Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977) (allowing jurisdiction in North Carolina where "the articles in issue were directed at a North Carolina resident, and any damage which those articles caused could reasonably be expected to occur in North Carolina."). *See also, Rusack* v. *Harsha,* 470 F.Supp. 285, 291 (M.D. Pa. 1978); *McGuire* v. *Brightman*, 79 Cal. App. 3d 776, 145 Cal. Rptr. 256 (1st Dist. 1978).

Barring a state from asserting long-arm jurisdiction based on mere circulation unless the plaintiff has at least a substantial in-state reputation allows publishers some assurance about where they might and might not be liable to suit. This measure of predictability would enable them to structure their primary conduct with a view towards its foreseeable consequences, *World-Wide Volkswagen, supra*, 444 U.S. at 297, and would thus contribute to the "orderly administration of the laws." *International Shoe, supra*, 326 U.S. at 319.

In contrast, under petitioner's proposed rule—allowing jurisdiction in *any* state where a publication is circulated—publishers would be left guessing where suit might result. They would be forced to conform their standards of reporting, writing and editing to those of the state whose laws were most restrictive, thus limiting the free flow of ideas and information in those states whose public policy accords publishers more breathing room. And they could avoid suit in any particular state only by completely discontinuing circulation there.[19]

Predictability is particularly important where First Amendment rights are at stake. *See Smith* v. *Goguen*, 415 U.S. 566, 573 (1974) (the Due Process vagueness doctrine "demands a greater degree of specificity" where First Amendment rights are concerned than in other contexts). Where the possibility of litigation could inhibit the exercise of First Amendment

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19 *See New York Times Co.* v. *Connor*, 365 F.2d 567, 572 (5th Cir. 1966) *cert. denied*, 432 U.S. 911 (1967):

> "In the face of this very real risk [that a local jury in a distant state might be incensed by an out-of-state publication], could a publisher justify distribution of his product in any state where the size of his circulation does not balance the danger of this liability? Certainly, a mere 395 issues per day as involved in the instant case would not be sufficient. As a result, those people in the State of Alabama who wish to read a publication such as the New York Times would be deprived of this opportunity."

rights,[20] it is vital that publishers be able to assess with as much clarity as possible in which forum and under what laws that consequence is likely to result. Publishers would be deprived of that ability under any standard that would allow suit virtually anywhere. Such a standard could disproportionately discourage the exercise of First Amendment rights by broadly inhibiting both circulation and content, not only in states where suit ultimately would be brought, but even in places where the risks to be avoided would not in fact be realized. *Cf. Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964).

No countervailing interest justifies such a broad chill upon speech. To the contrary, libel plaintiffs have more than adequate opportunities to seek "convenient and effective relief . . ." *World-Wide Volkswagen, supra*, 444 U.S. at 292, in states with a more substantial connection with the controversy, where their own ties and convenience generally would be greatest or where the defendant is truly present. There is no substantial reason for also granting to plaintiffs the right to sue in jurisdictions with no significant connection with, or interest in, their claim.

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20 As this Court observed in *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938), the First Amendment protects the right to circulate as surely as it does the content of speech itself:

> " 'Liberty of circulating is as essential to that freedom as liberty of publishing: indeed, without the circulation, the publication would be of little value.' *Ex parte Jackson*, 96 U.S. 727, 733."

CONCLUSION

For the reasons stated above, *amici* respectfully urge this Court to affirm the decision below, and to hold that in-state circulation of an allegedly defamatory publication is not, by itself, sufficient to establish long-arm jurisdiction.

Respectfully submitted,

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CBS Inc., through its CBS News Division, is engaged in the nationwide dissemination of news over the facilities of the CBS Television and Radio Networks. In addition, CBS provides extensive local news coverage through its five owned television stations, and fourteen owned AM and FM radio stations. The CBS Publishing Group publishes and distributes nationwide nine magazines and one newspaper supplement, as well as hard-cover books, both fiction and non-fiction.

Dow Jones & Company, Inc. publishes, *inter alia, The Wall Street Journal,* with daily national circulation in excess of 2,000,000, *Barron's National Business and Financial Weekly,* with circulation in excess of 300,000, a variety of national and international electronic news services, textbooks through its Richard D. Irwin, Inc. subsidiary, and 20 community daily newspapers from coast to coast through its Ottaway Newspapers, Inc. subsidiary.

The Hearst Corporation is a diversified privately-held company which is engaged in a broad spectrum of commercial activities including communications, paper manufacturing, ranching, timber growing and land management. It publishes nationally distributed magazines, newspapers and hard-cover and soft-cover books, and it owns and operates a leading feature syndicate, television and radio broadcast stations and cable television systems.

The Magazine Publishers Association ("MPA") is an organization representing the interests of nearly 200 publishers who are responsible for the publication of approximately 800 diverse consumer-oriented periodicals that are circulated throughout the United States, ranging from *Foreign Affairs* to *Fly Fisherman.* MPA member magazines include *Better Homes and Gardens, Reader's Digest, Good Housekeeping, Atlantic, Harper's, Bon Appetit, Essence, Scientific American, Colonial Homes* and *The New Yorker.* Circulation of MPA member magazines exceeds 290 million copies per issue.

The Miami Herald Publishing Co., a division of Knight-Ridder Newspapers, Inc., publishes *The Miami Herald,* which has

a daily circulation of 422,275. *The Miami Herald* circulates nationally and internationally.

Newsweek, Inc., a New York corporation, publishes a weekly international news magazine, *Newsweek*. Newsweek gathers reports from 26 bureaus around the world, including nine domestic offices outside the New York City area. Weekly net paid circulation is nearly 3 million copies nationwide.

The New York Times Company publishes *The New York Times*, which has a national circulation of 929,000 on weekdays and 1,523,000 on Sundays, 30 other newspapers of local or regional circulation, and the national magazines *Family Circle, Golf Digest* and *Tennis*. The New York Times Company also owns three television stations, two radio stations and cable TV systems, and two book publishers, Times Books and Arno Press.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working news reporters and editors dedicated to defending the First Amendment and the free flow of information to the public. The Reporters Committee, headquartered in Washington, D.C., has filed *amicus* briefs in many other significant media libel cases, including *Calder* v. *Jones*, No. 82-1401; *Herbert* v. *Lando*, 441 U.S. 153 (1979); and *Pring* v. *Penthouse International Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3893 (June 20, 1983).

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, non-profit organization of 28,000 members representing every branch and rank of print and broadcast journalism. Formed in 1909, it is the largest organization of journalists in the United States. Among the Society's purposes is its commitment to ensure that the public is well informed about matters of interest through the dissemination of news and information throughout the United States.

Time, Inc., is the largest publisher of general circulation magazines in the United States. It publishes TIME, SPORTS ILLUSTRATED, PEOPLE, FORTUNE, MONEY, LIFE, and DISCOVERY. These magazines are sold by subscription and by single copy sales throughout the United States.

Tribune Company, itself or through subsidiary companies, publishes major daily newspapers such as *The Chicago Tribune, The New York Daily News, The Orlando Sentinel, The Ft. Lauderdale News* and *Sun Sentinel,* and *The Los Angeles Daily News.* Tribune Company subsidiaries also own and operate several broadcasting stations, including WGN and WGN-TV in Chicago, WPIX-TV and WPIX (FM) in New York, and KWGN-TV in Denver, as well as an independent news network that is received in 125 markets across the country and several cable networks.

MOTION FILED
JUN 27 1983

No. 82-485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KATHY KEETON,

Petitioner,

vs.

HUSTLER MAGAZINE, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

AND

BRIEF FOR MOTOR VEHICLE MANUFACTURERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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June 1983

Pandick Press Midwest, Inc., Chicago • 454-7600

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Motor Vehicle Manufacturers Association of America, Inc. ("MVMA") respectfully moves, pursuant to rule 36.3 of the Rules of the Court, for leave to file a brief *amicus curiae* in this case in support of respondents. Respondents' counsel has consented to the filing of this brief but petitioner's counsel has not.

The brief which the MVMA wishes to file in this case supplements the brief it has, with leave of Court, filed as *amicus* in No. 82-1127, *Helicopteros Nacionales de Columbia* v. *Hall*. As in that case, the concern of the Association and its members—and, no doubt, of all other corporations doing a nationwide business—is that litigation should be brought in a forum which has a substantial relation to the controversy and the

parties. This case presents the question whether suit can be brought in a jurisdiction which has the longest statute of limitations, even though its relationship to the controversy and the parties is, at most, insignificant.

That problem also is present in the still pending action against an MVMA member in which a panel of the Fifth Circuit has held that suit can be brought in a forum chosen solely to escape the bar of the statute of limitations of the only state having any relation to the controversy. *Cowan* v. *Ford Motor Company*, 694 F.2d 104 (5th Cir., 1982), suggestion for rehearing *en banc* pending.* In that case, selection of the forum with the longest limitation period was permitted even though the forum's only "contact" with the case was that the defendant corporation had engaged in local business completely unrelated to the controversy and had designated an agent to accept service of process as required by state law, as it has done in all fifty states.

Although the cases are distinguishable, the grounds on which the Court decides the instant case may well determine whether corporations engaged in business nation-wide will be subject to suit on any claim in the state with the longest statute of limitations, no matter how slight its relationship to the case or the parties or how inconvenient that will be for all the parties and the trial court.

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* In the *Cowan* case the Fifth Circuit has requested the parties to file supplemental briefs.

As in *Helicopteros*, the MVMA believes that it is uniquely qualified to explain the significance to national corporations generally of the issues presented and the Court's disposition of them. It therefore respectfully requests leave to file a brief *amicus curiae*.

Respectfully submitted,

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June 1983

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR MOTOR VEHICLE MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Motor Vehicle Manufacturers Association ("MVMA") is a trade organization that includes the nation's principal manufacturers of motor vehicles. Members of the MVMA distribute their products in every state in the union. They have a direct interest in urging this Court to affirm that corporations engaged in business throughout the nation shall not be suable on any subject in the state with the longest statute of limitations, no matter how unrelated their activities in that state may be to the plaintiff or the subject of the litigation. Their concern is not academic, as appears from the adverse decision of the Fifth Circuit in *Cowan* v. *Ford Motor Co.*, 694 F.2d 104 (1982), suggestion for rehearing *en banc* pending.

SUMMARY OF ARGUMENT

In determining whether a state court's exercise of jurisdiction or choice of law violates the Due Process and Full Faith and Credit Clauses, this Court has indicated in a number of recent decisions, most notably *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302 (1981), *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), and *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), that the Constitution protects a defendant against a plaintiff's unfair choice of a forum and prevents a state from assuming jurisdiction over a case when to do so would improperly impinge on the interests of one or more other states.

We submit that when, as in this case—and even more clearly in the more typical single-state tort case—suit is brought in a state having no substantial connection with the parties or the tort for the sole purpose of obtaining a more favorable statute of limitations, the contacts are insufficient either to support the jurisdiction of the forum state or to justify application of its law.

a. In such circumstances careful analysis of the forum state's contacts and interests is required before applying its statute of limitations, even though, for other purposes, such statutes often have been classified as procedural. That classification does not override the mandate of the Due Process and Full Faith and Credit Clauses, which require invalidation of "the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests with the parties and the occurrence or transaction." *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302, 308, 332 (1981).

A forum state may have a procedural interest in safeguarding its courts against stale litigation and in protecting parties against long-delayed claims by applying its own *shorter* statute of limitation. But the forum has no legitimate interest, procedu-

ral or otherwise, in reviving a cause of action after it is dead in the state which created it through application of the forum's *longer* limitation period.

Nor should the forum's statute of limitations govern merely because the defendant does some unrelated business there or has appointed an agent to accept service. Most national companies do that in every state, and often in many other countries. In the absence of other substantively relevant contacts, no state has a legitimate interest in having its law apply to everything a corporation does throughout the nation or the world. That would invite forum-shopping on a grand scale.

b. The small proportion (less than one percent) of the distribution of respondents' publication in New Hampshire is not a sufficient ground for subjecting respondents to suit in New Hampshire for damages resulting from the distribution of their publication in all the other states in which the period of limitation has expired. To do so not only would effectively nullify the policy of the 49 states whose statutes of limitations have expired, but also would unfairly expose respondents to liability for damages contrary to their reasonable expectation of repose. In any event, in the more typical tort cases with which the members of the MVMA are concerned, which arise only in one state, the mere fact that the defendant conducts some business unrelated to the cause of action is not in itself a sufficient contact to warrant subjecting it to suit in such a state or to that state's law.

This Court should not permit companies which do business throughout the nation to be sued in all types of cases in the state having the longest statute of limitations when that state has no substantial relation to the contr[illegible]ersy or the parties.

ARGUMENT

THE DUE PROCESS AND FULL FAITH AND CREDIT CLAUSES FORBID A FORUM STATE FROM EXERCISING JURISDICTION OVER OR APPLYING ITS LAW TO A CASE WITH WHICH THE FORUM STATE HAS NO SUBSTANTIAL CONTACTS

In this case and cases such as *Cowan* v. *Ford Motor Co.*, 694 F.2d 104 (5th Cir. 1982), in which the members of the MVMA have an interest, subjecting defendants to the longer statute of limitations of a forum state presents two questions under the Due Process and Full Faith and Credit Clauses which, though different, to a large extent overlap:

1. Whether the trial court has personal jurisdiction over the defendant, and

2. Whether the law of the forum can apply to transactions and parties which have no, or at most slight, connection with the forum state.

This Court has applied the minimum contacts test to both issues. The opinions of Justices Brennan and Powell in *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302, 308, 317, n.23, 332 (1981), appear to be in accord as to this. The Court also seemed to agree that although "examination of a State's contacts may result in divergent conclusions for jurisdiction and choice-of-law purposes," "both inquiries, 'are often closely related and to a substantial degree depend upon similar considerations'" (*id.* at 317, 320-321).[1]

In *Allstate*, the plurality and the dissenting opinions (449 U.S. at 308, 332) agreed that

> "in deciding constitutional choice-of-law questions . . . this Court has traditionally examined the contacts of the State,

[1] Justice Stevens similarly stated that "[a]lthough the choice-of-laws concerns—respect for another sovereign and fair play necessary to the litigants—are similar to the two functions performed by the jurisdictional inquiry, they are not identical." (*Id.* at 320-321, n.3).

> whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation . . .."

Thus the lesson from prior cases on choice of law is:

> "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." (*Id.* at 312-313, 332).

Indeed, within a year of *Allstate*, this Court affirmed a decision of the Eighth Circuit which, after reviewing the authorities, declared:

> "When a state's law is applied to a transaction with which the state has no significant contact, it infringes upon the legitimate interests that other states may have in the transaction; this infringement is not reasonable—in a due process sense—within the context of our federal system of government."

McCluney v. *Schlitz Brewing Co.*, 649 F.2d 578, 582 (C.A. 8, 1981), affirmed, 454 U.S. 1071 (1981).

World-Wide Volkswagen v. *Woodson*, 444 U.S. 286, 291-292 (1980), adopted a similar approach in analyzing *in personam* jurisdiction:

> "The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."

These decisions follow *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316-319 (1945), and *Shaffer* v. *Heitner*, 433 U.S. 186, 203-204 (1977), in holding that personal jurisdiction over a defendant requires that the defendant have minimum contacts with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."

> "[T]he inquiry into the State's jurisdiction over a foreign corporation appropriately focused not on whether the corporation was 'present' but on whether there have been 'such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.'" • • •
>
> "'Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.'
>
> "Thus, the relationship among the defendant, the forum and the litigation . . . became the central concern of the inquiry into personal jurisdiction." (433 U.S. at 204).

With respect to both personal jurisdiction and choice-of-law issues, the Court has emphasized that it is concerned both with protecting a defendant "against the plaintiff's unfair choice of a forum" and "preventing a State from taking jurisdiction of a case when to do so would improperly impinge on the interests of one or more of the states."[2]

The nature of these two concerns suggests that, although the same factors are considered, greater weight should be given to the unfairness to the defendant when the issue is whether the Court has personal jurisdiction, but to reasonableness in the context of our federal system of government when the issue is whether a State can apply its law to a case with which it has little contact.[3]

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[2] W. Reese, *Legislative Jurisdiction*, 78 Colum. L. Rev. 1587, 1589 (1978).

[3] Shaffer v. *Heitner*, 433 U.S. 186 (1977), *Hanson* v. *Denckla*, 357 U.S. 235, 253-254 (1958), and *Kulko* v. *California Superior Court*, 436 U.S. 84, 92, 98 (1978) demonstrate that the relevant

Footnote continued on next page.

Professor Reese, who was the Reporter for *Restatement (Second) of Conflict of Laws*, concludes that, although this Court has not explicitly so declared, an analysis of its opinions indicates "that whereas considerations of fairness to the parties have been emphasized in the area of judicial jurisdiction, greater weight has been accorded federal (or international) system values in the case of legislative jurisdiction."[4] He subsequently observed:[5]

Footnote continued from previous page.

factors are not necessarily given the same weight in passing upon personal jurisdiction and choice-of law. *Shaffer* declared that the Court has "rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute" (433 U.S. at 215). In order to justify subjecting a defendant to a forum's jurisdiction, there must be some substantively relevant action of the defendant in the forum which makes it "reasonable" and "fair" to require him to defend himself there. *Kulko*, 436 U.S. at 92, 98.

[4] W. Reese, *Legislative Jurisdiction*, 78 Colum. L. Rev. 1587, 1593 (1978). Professor Reese has characterized "the power of a state to apply its law to create or affect legal interests" as "legislative jurisdiction," in contrast to the "judicial jurisdiction . . . of a state to try a case in its courts." (*Id.* at 1587).

While recognizing that this Court has not yet attempted to define "legislative jurisdiction," Professor Reese suggests that:

> "Inasmuch, however, as the same constitutional provision governs both judicial and legislative jurisdiction and the same general considerations apply to both, it should follow that the same basic principle underlies both areas. In other words, it is suggested that the principle for determining questions of legislative jurisdiction is whether it would be reasonable in the context of our federal system of government for the state in question to apply its law in the particular case. • • •
>
> "As in the case of judicial jurisdiction, application of this principle to the question of legislative jurisdiction would involve a twofold test; whether application of the law of the particular state to the point at issue would be fair to the parties and also consistent with the needs of the federal (or international) system." (*Id.* at 1592.)

[5] W. Reese, *The Hague Case: An Opportunity Lost*, 10 Hofstra L. Rev. 195, 201 (1981).

> "The Supreme Court has recently held that federal-system values must be considered in determining whether a state has jurisdiction under due process to hear a case in its courts. There is good reason for supposing that these values should play an even more significant role when it comes to assessing the propriety of a court's choice of law. Surely, a state's interests are more likely to be affected by the application of a foreign law to determine the rights of the parties than when the court of another state simply entertains the case."

We submit that when, as in this case—and even more clearly in the typical single-state tort cases with which national business enterprises are most often concerned—suits are brought in states having no substantial connection with the parties or the tort for the sole purpose of obtaining a more favorable statute of limitations, the contacts are insufficient either to support the jurisdiction of the forum state or to justify application of its law.

(a) The statute of limitations of a forum state having no substantial connection with the matter in litigation should not be controlling.

The decision of the court of appeals should be affirmed because there is no reasonable basis for applying the statute of limitations of a state having no connection with a defamation claim except the distribution of less than one percent of the defamatory material within its borders, particularly when the object of the suit includes the collection of damages for the effect of the publication in the forty-nine other states whose statutes of limitations have expired.[6]

Even more plainly, when a tort occurs in a single state other than the forum, there is no reasonable basis for applying the longer statute of limitations of a forum having no connection at all with the tort, the injury resulting therefrom, or the plaintiff. This is the situation in the cases with which the members of the MVMA are concerned.

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[6] Petitioner brought suit in New Hampshire "which, she says, is the only state remaining in which the statute of limitations has not run." (Pet. App. 13a).

To be sure, statutes of limitations often have been said to be "procedural" and thus subject to the law of the forum (*e.g.*, *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514, 517 (1953)), even though, as a practical matter, they are outcome-determinative and substantive.[7] But that method of classification for other purposes does not override the constitutional principle that invalidates "the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction." *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302, 308, 332 (1981). A constitutional doctrine directed at practical problems should not become inapplicable merely because a statutory provision has been labeled procedural rather than substantive.

This Court repeatedly has rejected such conclusory characterizations. In *Home Insurance Co.* v. *Dick*, 281 U.S. 397, 405-406 (1930), a State's attempt to classify a one-year contractual limitation provision as procedural did not make it any less unreasonable for the State to ignore that limitation when forum contacts with the underlying controversy were lacking.[8] See also *John Hancock Mutual Life Ins. Co.* v. *Yates*, 299 U.S. 178, 181-182 (1936).

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[7] Most modern scholars agree that "there is little reason for this rule [treating statutes of limitations as procedural] other than historical," which may be traceable to the antipathy of the English courts 200 years ago toward reliance on foreign law. H. Goodrich, *Conflict of Laws* 152 (4th Ed. 1964). "As applied to causes of action barred where they arose, [this] does not make very good sense." Leflar, *American Conflicts Law* 253 (3rd Ed. 1977); H. Lorenzen, *The Statute of Limitations and The Conflict of Laws*, 28 Yale L. J. 492, 496-497 (1919) ("no reasons" nor "any policy" supports enforcement of "a foreign cause of action which is barred by the law governing the substantive rights of the parties").

[8] Cf. *Verlinden B.V.* v. *Central National Bank of Nigeria*, 51 U.S. Law Week 4567, 4572 (May 23, 1983), in which the fact that an "inquiry into foreign sovereign immunity is labeled under the Act as a matter of jurisdiction" did not limit the constitutional power of Congress to regulate the subject.

The leading commentators agree that this type of labeling is not a substitute for constitutional analysis. A forum state should not be permitted to extend the life of a tort action which is barred by the statute of limitations of the only state with significant contacts with the litigation. As Professor Leflar has stated (*American Conflicts Law*, § 61 at 120 (3rd. Ed., 1977)):

> "Difficult questions are encountered. . .when issues that may be outcome-determinative, such as. . .statute of limitations (which determines whether any action may be brought) are characterized as procedural. *Home Ins. Co.* v. *Dick* and *John Hancock Mut. Life Ins. Co.* v. *Yates* warn us that a forum's procedural characterization can go too far. It goes too far not because of any technical rule of characterization, but for the same 'fair play and substantial justice' reasons that make it unconstitutional when any court deprives any person of his life, liberty, or property by applying a law which has so little substantial connection with the issues in his case as to make the application an unreasonable one." (Footnotes omitted.)

> "There is no inherent reason why the choice between statutes of limitations should be handled any differently than other choice-of-law problems." *Id.* at 256.

Professor Weintraub similarly has observed (*Commentary on the Conflict of Laws*, § 9.2B at 517 (2d Ed., 1980)):

> "it seems highly unreasonable for a forum that has no significant contact with the controversy to employ its own longer statute to extend the limitations period. Such conduct serves no substantial interest of the forum . . . . Application of the forum's longer limitation period results in a judgment on the merits different from the judgment that could have been obtained in the jurisdiction with which the controversy is most closely connected. A state ought not be able to apply its own law to a case on the sole ground that the law applied is 'procedural' if application of forum law advances no relevant forum policy and if application of the relevant foreign rule would not be unduly burdensome on the forum when measured against the likelihood that failure to apply the foreign rule will change the outcome of the litigation." (footnotes omitted).

The *Wells* case, in which only full faith and credit contentions were presented, spoke generally in asserting that the forum state could enforce its own statute of limitations. But its holding was that the forum could apply its own *shorter* statute of limitations. That this was the Court's concern is shown by its quotation from the *Restatement of Conflicts of Laws*, § 603 (1934), and *Order of United Commercial Travelers* v. *Wolfe*, 331 U.S. 586, 607 (1947), for:

> "...the well-established principle of conflict of laws that 'If action is barred by the statute of limitations of the forum, no action can be maintained though action is not barred in the state where the cause of action arose' ". 345 U.S. at 516-517.

That is, the forum is free to apply its own shorter period of limitations. This protects the forum state's procedural interest in safeguarding its courts against stale litigation and faulty memories and in protecting parties against long-delayed claims. Professor Martin has aptly stated in relation to *Wells:*

> "The procedural interest that can justify Pennsylvania in giving a shorter lifetime than Alabama affords to an Alabama cause of action cannot possibly justify Pennsylvania in giving it a longer life. Realistic situations in which the interest of a state are served by sustaining a cause of action longer than the state which created it are highly unlikely. One might therefore suggest a simple constitutional rule with respect to the statutes of limitations in cases where the forum has no substantive interests: The forum may be justified in using its own statute of limitations to bar a cause of action that is still good in the state which created it, but a state should be forbidden from entertaining a cause of action after it is dead in the state which created it."[9]

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[9] J. Martin, *Constitutional Limits on Choice of Law*, 61 Cornell L. Rev. 185, 221 (1976). To the same effect, see R. Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.U.L. Rev. 813, 846-850 (1962).

Thus it is "hard to justify the forum's entertainment of a case that would be barred by the only substantively interested jurisdiction, even if the common law would justify the result by calling the limitations rule a 'procedural' one." Martin, *supra*, at 223. As previously noted, the Court in *Wells* permitted the forum to apply its own shorter period of limitations: it did not permit the forum to revive "a cause of action after it is dead in the state which created it."

That is precisely what petitioner in this case is seeking to do. Her cause of action was dead not only in the States (Ohio and New York) which had the most significant contacts with respondents' alleged defamation and with herself, but also in every other state except New Hampshire.

Even if the distribution of Hustler Magazine in New Hampshire should be regarded as creating a significant relationship between the subject matter of the litigation and that State, that would not be true in cases in which there was no such relationship. The forum's longer statute of limitations should not govern in such circumstances merely because the defendant does some unrelated business in the forum or has appointed an agent to accept service. Most national companies do business and have appointed an agent in every state in the union, and often in many other countries. In the absence of contacts other than these universal ones, no state has a legitimate interest in having its law apply to everything a corporation does throughout the nation or the world. In the words of Justice Powell in *Allstate* (449 U.S. 337), "the invitation to forum-shopping would be irresistible."[10] In contrast to *Allstate*

[10] In view of this concern, a substantial number of states have enacted "borrowing statutes," by which the forum adopts the statute of limitations of the jurisdiction having substantial contacts with the cause of action. *See, e.g., Order of United Commercial Travelers* v. *Wolfe*, 331 U.S. 586, 607 (1947) ("These numerous 'borrowing statutes' demonstrate the general recognition of the sound public policy of limiting, under some circumstances, the application of the

Footnote continued on next page.

(see plurality opinion, p. 319), the only reason for suing in the forum here (and in the *Cowan* case) was to take advantage of its more favorable statute of limitations.

(b) Respondents' contacts with New Hampshire are not sufficient to subject them to the jurisdiction of New Hampshire courts.

The reasons why subjecting respondents to the jurisdiction of the New Hampshire courts is not fair and reasonable are fully set forth in the Brief for Respondents. In addition, the legal principles governing *in personam* jurisdiction are discussed in detail in our *amicus* brief in the *Helicopteros* case. Accordingly that analysis will not be repeated here.

We wish to emphasize, however, that the court of appeals correctly took petitioner's forum shopping activities into account when applying the Due Process Clause to the issue of *in personam* jurisdiction. See Pet. App. 17a-19a. The Due Process Clause prevents a trial court from exercising jurisdiction when it would be fundamentally unfair to do so. In the present case, petitioner permitted her cause of action to expire in 49 states. Yet she now seeks to impose liability upon respondents stemming from distribution of their products in all 50 states. This not only would effectively nullify the policy of the 49 states whose statutes of limitations have expired, but also would unfairly expose respondents to liability for damages contrary to their reasonable expectation of repose.

As the court of appeals notes, the major factor supporting resort to a New Hampshire forum is that a small portion (less than one percent) of respondents' publication was distributed

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general statute of limitations of the state of the forum. The full faith and credit clause, applied, as in the present case, is but another limitation voluntarily imposed, by the people of the United States, upon the sovereignty of their respective states in applying the law of the forum").

in New Hampshire. Pet. App. 15a. In that respect, this case differs from *Helicopteros* (No. 82-1127), as well as cases such as *Cowan* v. *Ford Motor Co.*, in which the tort and the injury to the plaintiff did not occur in a large number of states. This case would resemble the more typical tort cases if respondents' only connection with New Hampshire had been that they distributed in that State less than one percent of the copies of a magazine which did *not* contain the alleged libel. Even though that proportion of their unrelated business might produce substantial revenues, such business activities unquestionably should be insufficient to warrant subjecting publications that were not distributed in New Hampshire to New Hampshire law. Likewise, a personal injury claim against a manufacturer should not be governed by the law of a state in which the plaintiff did not reside and the injury did not occur merely because the defendant sold unrelated products there.

The object of this brief is to make the Court aware of the possible impact of cases such as this upon all corporations doing business in many or all states. The Court should not, we submit, permit such companies to be sued on any cause of action in the state having the longest statute of limitations when that state has no substantial relation to the controversy or the parties.

CONCLUSION

For the above reasons, the judgment of the court of appeals should be affirmed.

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June 1983

No. 82-485-CFX
Status: GRANTED

Title: Kathy Keeton, Petitioner
v.
Hustler Magazine, Inc., et al.

Docketed:
September 14, 1982

Court: United States Court of Appeals
for the First Circuit

Counsel for petitioner: Grutman, Norman Roy

Counsel for respondent: Kahn, David L.

Entry	Date	Note	Proceedings and Orders
1	Sep 14 1982	G	Petition for writ of certiorari filed.
2	Oct 12 1982		Brief of respondent Hustler Magazine, et al. in opposition filed.
3	Oct 13 1982		DISTRIBUTED. October 29, 1982
4	Dec 3 1982		Record filed.
5	Dec 6 1982		REDISTRIBUTED. December 10, 1982
7	Jan 3 1983		REDISTRIBUTED. January 7, 1983
9	Jan 10 1983		REDISTRIBUTED. January 14, 1983
11	Jan 17 1983		REDISTRIBUTED. January 21, 1983
12	Jan 24 1983		Petition GRANTED.
			**********
14	Feb 24 1983		Order extending time to file brief of petitioner on the merits until April 9, 1983.
15	Apr 11 1983		Joint appendix filed.
16	Apr 11 1983		Brief of petitioner Kathy Keeton filed.
17	Apr 22 1983	D	Motion of respondents for divided argument and for additional time for oral argument filed.
21	Apr 22 1983		Order extending time to file brief of respondent on the merits until June 27, 1983.
24	May 4 1983		Opposition of petitioner to motion of respondents for divided argument and for additional time for oral argument filed.
25	May 10 1983		Respondents reply to petitioner's opposition to motion for divided argument and additional time filed.
26	May 16 1983		Motion of respondents for divided argument and for additional time for oral argument DENIED.
27	Jun 24 1983		Brief of respondents Hustler Magazine, et al. filed.
28	Jun 27 1983	G	Motion of Motor Vehicle Manufacturers Association of America, Inc. for leave to file a brief as amicus curiae filed.
29	Jun 29 1983	G	Motion of CBS Inc., et al. for leave to file a brief as amici curiae filed.
30	Jun 29 1983	G	Motion of Association of American Publishers, Inc. for leave to file a brief as amicus curiae filed.
31	Aug 16 1983		CIRCULATED.
32	Aug 23 1983		Motion of Motor Vehicle Manufacturers Association of America, Inc. for leave to file a brief as amicus curiae GRANTED.
33	Aug 23 1983		Motion of CBS Inc., et al. for leave to file a brief as amici curiae GRANTED.
34	Aug 23 1983		Motion of Association of American Publishers, Inc. for leave to file a brief as amicus curiae GRANTED.

No. 82-489-CFX

Entry	Date	Note	Proceedings and Orders
35	Sep 21 1983		SET FOR ARGUMENT. Tuesday, November 8, 1983. (1st case) (1 hour)
36	Nov 1 1983	X	Reply brief of petitioner Kathy Keeton filed.
37	Nov 8 1983		ARGUED.